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TRANSCRIPT OF [illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. [illegible] 361.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, ET AL., APPELLANTS,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED [illegible]

(21,[illegible])

(21,506.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 710.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, ET AL., APPELLANTS,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in October, 1908, at Atlanta, Georgia, before the Honorable David D. Shelby, Circuit Judge, and the Honorable William T. Newman and the Honorable Waller T. Burns, District Judges, and on the first Monday in November, 1908, at New Orleans, Louisiana, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, Circuit Judges.

No. 1854.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL., Appellants,
vs.
THE MACON GROCERY COMPANY ET AL., Appellees.

Be it remembered that heretofore, to-wit: on the 24th day of August, 1908, a transcript of the record of the above styled cause from the Circuit Court of the United States for the Southern District of Georgia, was filed in the office of the Clerk of said United States Circuit Court of Appeals for the Fifth Circuit, in the words and figures following, to-wit:

1 In the United States Circuit Court for the Western Division of the Southern District of Georgia.

MACON GROCERY COMPANY ET AL.
versus
ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

In Equity, Bill, etc. Filed July 27, 1908.

Interlocutory Decree. Filed August 4, 1908.

Appeal.

Transcript.

United States Circuit Court, Western Division, Southern District of Georgia.

UNITED STATES OF AMERICA,
Western Division, Southern District of Georgia, ss:

I, Tomlinson F. Johnson, Clerk of the Circuit Court of the United States for the Southern District of Georgia, do hereby certify that the writing annexed to this certificate is a true and correct transcript of

the record as directed by law to be made, and copies of the proofs and of such entries and papers of file as is necessary on the hearing of the appeal in the equity cause of the Macon Grocery Company, *et al.*, complainants, and the Atlantic Coast Line Railroad Company, *et al.*, respondents, late pending in said Circuit Court of the United States for the Western Division of the Southern District of Georgia, and appealed by respondents to the Circuit Court of Appeals for the Fifth Circuit, as the same remains of file and of record in my office.

Witness my official signature and the seal of the said Court at Macon, Ga., this 19th day of August, A. D. 1908.

[SEAL.] TOMLINSON F. JOHNSON, *Clerk*,
By CECIL MORGAN, *Deputy Clerk*.

In the Circuit Court of the United States for the Southern District of Georgia.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD CO. ET AL.

Bill. In Equity.

To the Honorable, the Judges of said Court:

The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merrits & Company, F. W. Hazlehurst Company, each of whom is a corporation duly organized and existing under the laws of the State of Georgia, and a citizen of the State of Georgia, with its principal place of business in the City of Macon, in the Southern District of Georgia; Adams & Johnston, a partnership composed of D. D. Adams, D. T. Adams, and C. Y. Johnston; Solomon & McRae, a partnership composed of W. D. Solomon and D. I. McRae; R. T. Birdsey & Company, a partnership composed of R. J., J. F. and S. R. Birdsey; George A. McArthur, each of whom is a citizen of the State of Georgia, and an inhabitant of the Southern District of Georgia, residing in the City of Macon; People's Grocery Company, Parker, Willis Company, Cordele Grocery Company, each of whom is a corporation organized and existing under the laws of the State of Georgia, and a citizen of the State of Georgia, with its domicile and principal place of business in the City of Cordele, in the Southern District of Georgia; Albany Grocery Company, Tift & Peed Grocery Company, each of whom is a corporation organized and existing under the laws of the State of Georgia, and a citizen of said State, with its domicile and principal place of business in the City of Albany in the Southern District of Georgia; A. S. Pendleton Company and Dalton Grocery Company, each of whom is a corporation organized and existing under the laws of the State of Georgia, and a citizen of said State, with its domicile and principal place of business in the City of Valdosta in the State of Georgia, Marion

Curry, a citizen of the State of Georgia, residing in the City of Valdosta in the Southern District of Georgia; Orr, Smith Grocery Company, a corporation organized and existing under the laws of the State of Georgia, and a citizen of said State, with its domicile and principal place of business in the City of Dublin, Georgia; Brandon & Dryer, a partnership composed of D. S. Brandon and E.
3 Dryer, each of whom is a citizen of the State of Georgia, residing in the City of Dublin, in the Southern District of Georgia; and Gallaher Grocery Company, a partnership, composed of C. D. and W. H. Gallaher, each of whom is a citizen of the State of Georgia, residing in the City of Montezuma, in the Southern District of Georgia, bring this their bill of complaint in behalf of themselves and all other persons, firms and corporations similarly situated with respect to the subject matter of this suit, or interested in or affected thereby, against The Atlantic Coast Line Railroad Company, a corporation, organized and existing under the laws of the State of Virginia, and a citizen of the State of Virginia; the Louisville and Nashville Railroad Company, a corporation, organized and existing under the laws of Kentucky and a citizen of said State of Kentucky; the Nashville, Chattanooga & St. Louis Railway, a corporation, organized and existing under the laws of the State of Tennessee, and a citizen of said State of Tennessee; the Southern Railway Company, a corporation, organized and existing under the laws of the State of Virginia, and a citizen of said State of Virginia, and the Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation, organized under the laws of the State of Ohio, and a citizen of the State of Ohio, and thereupon your orators complain and say:

I.

The controversy herein presented is a suit of a civil nature in equity and the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000.00.

II.

Your orators are severally engaged in the respective cities above named as wholesale dealers in groceries, food products, and like commodities.

III.

The defendant railway companies, and each of them, are common carriers in the transportation of commodities and articles of interstate commerce, including the transportation of grain, flour, grain products, hay, and meats, from Ohio and Mississippi River crossings, Nashville, Tennessee, and points made with relation thereto,
4 the southeastern points of destination.

Your orators aver, on information and belief, that each of said defendant railway companies is a member of the Southeastern Freight Association, and that said association was organized and is maintained under agreement and for purposes which constitute an illegal combination in restraint of interstate trade and for the foster-

ing of monopoly in destruction of fair competition among carriers engaged in interstate trade.

Your orators charge that the defendant railway companies, by concurrence of action, and through the medium of the Southeastern Freight Association, can and do fix and maintain rates from Ohio and Mississippi River crossings to southeastern destinations in the State of Georgia, Florida and South Carolina. The defendant, the Louisville and Nashville Railroad Company, has continuous lines over its own rails from Cincinnati, Louisville, Evansville, Saint Louis, Memphis and Nashville to Atlanta, and as one of the lessees of the Georgia Railroad has entrance into Athens, Macon, and Augusta; the Nashville, Chattanooga & St. Louis Railway maintains and operates a through line from the Ohio River at Paducah, Kentucky, and from the Mississippi River, at Hickman, Kentucky, and at Memphis via Nashville to Atlanta; the Atlantic Coast Line Railroad Company, as one of the lessees of the Georgia Railroad, has direct connection with the Louisville and Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway; and over its line of railway reaches many important destinations in the South Georgia and Florida. The Southern Railway Company, in connection with the Cincinnati, New Orleans & Texas Pacific Railway, maintains and operates through lines from Cincinnati, Louisville and St. Louis to Atlanta, Macon, Columbus and many other important points of destination within the State of Georgia.

IV.

Your orators aver, upon information and belief, that the Nashville, Chattanooga & St. Louis Railway Company is owned or controlled by the Louisville & Nashville Railroad Company through the ownership of a majority of its capital stock; that the Atlantic Coast Line Company, a holding company, organized under the laws of the State of Connecticut, owns or controls both the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, thus constituting one large system of railway lines.

5 Your orators further aver, upon information and belief, that the Cincinnati, New Orleans & Texas Pacific Railway Company is owned or controlled by the Southern Railway Company through the ownership of stock or otherwise, and is to all practical intents and purposes a part of the Southern Railway system.

Your orators further aver, upon information and belief, that there is no other system with its own lines extending from Ohio and Mississippi River crossings, Nashville, Tennessee, and points made with relation thereto, to southeastern destinations within the State of Georgia, Florida and South Carolina; and that owing to the fact that the Southern Railway system and the Louisville and Nashville system have such continuous lines from Ohio and Mississippi Rivers to southeastern destinations, they can do, fix and maintain the rates between such points; that the said Southern Railway system and the Louisville and Nashville are naturally competitors, so that any combination, agreement or understanding between them, whereby rates are advanced and maintained, is in suppression of competition.

V.

Your orators show that during the year 1904, and prior thereto, there was much discontent with the railroad rates of freight from both Eastern and Western points of origin to Atlanta, and other points made with relation thereto, which included Macon, Columbus, Albany, Montezuma, Americus and Cordele. The question of the reduction in freight rates to Atlanta and related points had been pressed upon the attention of the carriers by the shippers and other interested parties, with the result that a citizens' committee was appointed by the City of Atlanta to confer with a committee of traffic officials of the railway lines initial Atlanta. Conferences were held on November 15th and 16th, and on December 6th and 7th, 1904, at the Piedmont Hotel, in the City of Atlanta, Georgia. The whole body of rates, both from eastern and western points of origin, was discussed and a general re-adjustment was arrived at. The rates from Ohio and Mississippi River crossings to Atlanta and related points were carefully examined and considered, and the following reductions were voluntarily accorded by the railway companies, to-wit:

6 Class B, 2 cts. per hundred pounds.
Class C, 2 cts.
Class D, 2 cts.
Class F, 4 cts.
Flour in sacks, 2 cts.
Fresh meats, C. L., 2 cts.

Similar reductions in rates were also made to Macon, Columbus and other points related in rates to Atlanta. It was agreed between the traffic officials of the railroad companies and the citizens' committee that the reduced rates were just, reasonable and compensatory. Subsequently the railway companies prepared and issued, effective 1st February, 1905, their freight tariff, incorporating these reduced rates, in which rates each of the railway companies, defendants to this bill, joined and concurred.

VI.

The reduced rates thus put into effect on February 1st, 1905, have since been maintained, and under them a large and growing traffic has moved. These rates were satisfactory to the shippers, and your orators charge were remunerative to the carriers. During the series of years that these reduced rates were maintained business and trade conditions became adjusted thereto to the benefit of the carrier, the dealer and the public, all of whom prospered thereunder.

VII.

Some time prior to the 1st of June, 1908, some of the carriers began a concerted movement, looking to an increase in the rates herein above mentioned. It was recognized that each of the two great systems maintaining and operating lines from the river crossings to Southeastern territory must unite in any proposed increase; and in order to fully accomplish the purpose, the intervention of the Southeastern Freight Association was sought and employed.

Your orators aver, on information and belief, that the Louisville & Nashville Railroad Company, the Atlantic Coast Line Railroad Company, and the Southern Railway Company, composing the two naturally competing systems, joined in and filed with the Southeastern Freight Association what is known as a declaration, announcing that on August 1st, 1908, they would make effective
7 an advanced in rates on the classes B, C. D fresh meats, C. L., grain products, hay and packing house products from Ohio and Mississippi River crossings, Nashville, Tennessee, and points with relations thereto, to Southeastern points. The advances this [thus] announced were as follows:

Class B	3 cents per one hundred pounds
Class C	2 cents per one hundred pounds
Class D	2 cents per one hundred pounds
Class F	4 cents per barrel
Fresh meats, C. L.	3 cents per one hundred pounds
Grain and hay	2 cents per one hundred pounds
Grain products	2 cents per one hundred pounds
Packing house products	3 cents per one hundred pounds

Your orators say, on information and belief, that this declaration (which was also joined in by the Central of Georgia Railway Company) was communicated by the chairman of the Southeastern Freight Association to each of the interstate lines of railway in the form of a circular designated "Information issue Number 516."

Your orators submit that this concurrence of action on the part of the two systems of railways effectively suppressed competition and forced all connecting carriers either to concur or give up the traffic. All interested lines did concur, acting in this regard through the agency of the Southeastern Freight Association.

Subsequently the Louisville & Nashville system filed with the Interstate Commerce Commission its freight tariff, embodying the advances in rates above mentioned, and gave notice that said tariff would become effective on August 1st, 1908; and the Southern Railway system likewise filed with the Interstate Commerce Commission its freight tariff setting out the identical advances in rates to become effective on the same day, to-wit, August 1st, 1908. In each of these tariffs, practically every interested line joined as a participating carrier, a list of such participating lines, numbering seventy-three, including each of the defendants hereto, being shown on page 2 of the tariff.

VIII.

Your orators are informed and believe, and hence aver that the method employed by the railway companies in advancing rates through the medium of the Southeastern Freight Association is substantially as follows:

8 There is an executive board consisting of the president, or other officer, of each constituent member. The unanimous consent of this board is required for the adoption of any motion or resolution. Each member of the board shall appoint a traffic official

of his line as a member of a committee known as the conference committee. Any member of the association proposing any change in rates, rules or regulations shall suggest the matter to the conference committee for consideration before such change shall take effect. It is the duty of the chairman of the association "to receive from each member of the association copies of tariffs or rates established by said member; the [to] compile, print and distribute such tariffs or rates in conformity with the Interstate Commerce Act and other laws." The member listing a subject shall state the rates to be discussed and the basis upon which they are made. The subject is then referred to a sub-committee for "recommendation. The member proposing a change shall suggest the same to other members directly interested and shall file a declaration setting forth in detail the proposed rates and the effective date thereof. The chairman will compile and publish such rates and furnish a copy to each member; he will also "docket" the matter for discussion and *and* consideration at the next meeting. Such matters shall not be discussed or considered by the correspondence through the chairman's office. The territory of the Southeastern Freight Association is roughly described as the States of South Carolina, Florida, Georgia and the portion of the State of Alabama, east of a line drawn from Chattanooga, through Birmingham, Selma and Montgomery to Pensacola. The territory east of this line and west of the Mississippi River, embracing Mississippi and parts of Louisiana and Alabama, comes with [within] the dominion of another like association, known as the Mississippi Valley Southeastern Freight Association. Joint meetings of these two associations is provided for by the rules of each, which joint sessions are to be held monthly. The subject to be discussed include rates applying from or through the territory of one association into or through the territory of the other. The line desiring any change from such inter-territorial rates advises the chairman of its association who dockets the subject for the discussion exactly as though it were a question of rates applying between points in the same territory. The States of Tennessee and Kentucky, including Ohio and Mississippi River crossings, are either embraced within the territory of the Mississippi Valley Southeastern
9 Freight Association, or in some other freight association bearing a similar relation to the Southeastern Freight Association. In like manner the territory north of the Ohio River and west of the Mississippi River, is dominated by similar traffic associations bearing a like relation to each other, and all potent through their constituent members in fixing and maintaining freight rates, and in suppressing competition and restraining interstate trade.

Your orators distinctly charge that the advance in the rates complained of, effective August 1st, 1908, was and is the direct outcome of understandings and agreements in suppression of competition and in unlawful combination in restraint of interstate trade arrived at and made effective through the agency of the Southeastern Freight Association and other affiliated freight associations; and that the acts of such combinations in advancing rates is the result of a conspiracy

which is unlawful, as well at common law as under the statutes of the United States.

IX.

Your orators further show that the proposed advance in rates will fall upon commodities of prime utility and of daily necessity, such as flour, grain, grain products, hay, meats, and packing house products, for all of which dealers and the public in the Southeastern States depend largely for supply upon the producing territory reached through Nashville, Tennessee, and the Ohio and Mississippi River crossings. Commodities of this character are entitled to as low a rate as may be consistent with a fair return to the carrier for the service of transportation rendered. The proposed sharp advance in the rates upon these commodities will seriously disturb existing trade relations, causing loss to your orators and other dealers and injury to the consuming public. These commodities being staple articles of daily use are necessary and properly sold upon a small margin of profit, the benefit to the dealer consisting in the volume of the business, and in the fact that the sale of staple commodities at small profits induces the sale of other goods. It is conservatively estimated that the proposed advance would represent a charge or tax to the dealers and public in the State of Georgia of not less than $500,000.00, and probably exceeding $1,000,000.00 annually. The narrow margin of profit obtained by the dealer will not permit him to absorb the entire advance so that the consuming public will be forced to bear some portion of the additional tax represented by a proportional increase in the price. The commodities upon which the rates are to be advanced are of such necessity, and the supply from other sources is so limited that considerable traffic will continue to move even under the exorbitant and unjust rates represented by the advance, but the effect of the increase will inevitably restrict the volume of the traffic, reduce the business of your orators and other dealers, and deprive the consuming public, or some part thereof, of the ability to purchase and use these commodities to that extent to which they are entitled to the irreparable loss and injury of your orators and others similarly situated, and to the prejudice of the public interest. It is submitted that the legal remedy is inadequate, for that the loss and damage resulting to your orators from the exaction of unjust and unreasonable rates, and the consequent restriction of their business is a constantly recurring grievance incapable of pecuniary estimation. Should the advance be ascertained and declared to be just and unreasonable, and should reparation be allowed, not only would such remedy be inadequate to compensate for the loss and damage suffered, but the enforcement of the right of reparation or of the right to threefold damages authorized under the Sherman Anti-Trust Act would bring about both a multitude and a multiplicity of suits.

Your orators further shows that the proposed advance is not a compensatory charge to fairly meet the cost and value of the service to be performed by the defendants and other carriers, but is an arbitrary and unlawful exaction. The voluntary establishment of the

reduced rates following the Atlanta conference, and the maintenance of those rates for more than four years, is both an admission and a declaration on the part of the carriers that such rates were reasonably high and compensatory under normal conditions. Under these rates traffic moved freely and the carriers prospered until the coming about of the abnormal conditions which followed the financial panic of October and November, 1907. For some months thereafter the volume of railway traffic greatly declined, resulting in a loss to the carriers of both gross and net earnings. This loss was attributable to a decrease in the volume of all traffic, but your orators believe it to be true that the decline in other traffic was much greater than that in the commodities which are the subject matter of the proposed advance. Not only were the carriers injuriously affected as a result of the panic, but all lines and classes of business and industries also suffered material loss.

11 Your orators charge, upon information and belief, that the net earnings of the defendants and other carriers have in recent months shown a decided advance, in some cases showing net earnings exceeding those for the corresponding months of the preceding year, and that there is every reasonable expectation that the net earnings will continue to increase, and that normal conditions will be restored. However this may be, your orators respectfully submit that the carriers have no right to take advantage of an abnormal condition, which in its nature is necessarily transitory, in order to make advances in rates upon the commodities of great utility and necessity, and more especially so when the preceding rates had been demonstrated by actual trial for a series of years to have been compensatory under normal conditions. It is further submitted that common carriers have no more right to advance in times of adversity in order to compensate for loss of tonnage than they have to increase rates during prosperous times, in order to share in the prosperity of the shipper.

In consideration whereof, and for as much as your orators are remediless at and by the strict rule of the common law, and can obtain relief only in a Court of equity, where matter- of this kind are properly cognizable and reviewable; which they can only obtain in a Court of equity, and that the defendants herein named may answer the premises, but not under oath or affirmation, discovery and answer under oath being hereby expressly waived (excepting as to the matters and things of which discovery is prayed), your orators pray:

First. That the Court will issue a rule directing the defendants, and each of them, commanding them, and each of them, to be and appear before one of the Judges of this Court, at such time and place as the Court may designate, then and there to show cause, if any they can, why the extraordinary relief herein prayed should not be granted and an injunction *pendente-lite* issued; and that in the meantime, and until the further order of the Court, the defendants, and each of them, be temporarily restrained from putting into effect the proposed increase in rates to be made effective August 1st, 1908, from the Ohio and Mississippi River crossings, and Nashville, Ten-

nessee, and points made with relation thereto, to all points within the State of Georgia, affected by said advance.

Second. That upon the hearing under the rule the Court will decree that a writ on injunction *pendente lite* do issue enjoin-
12 ing the defendants, and each of them, from putting into effect the said advance in rates referred to in the foregoing bill.

Third. That upon the final hearing the Court will enter a decree perpetually enjoining the said advance in the rates proposed to be made effective by defendant carriers on August 1, 1908.

Fourth. That the defendants, and each of them, be required to make discovery, and to produce on the hearing under the rule, and at all subsequent hearings of the cause, the following matters and things, to-wit:

(1) A certified or verified copy of the declaration filed by each of the defendants with the Southeastern Freight Association, or the Mississippi Valley Southeastern Freight Association, announcing its purpose to put into effect the advance in rates to be made effective on August 1st, 1908.

(2) A certified or verified copy of the circular designated as "Information issue Number 517," issued by E. H. Hinton, Chairman of the Southeastern Freight Association under date of June 26th, 1908.

(3) A certified or verified copy of the articles of association, rules and regulations of the Southeastern Freight Association and of the Mississippi Valley Southeastern Freight Association.

(4) All letters, telegrams and correspondence between the traffic officials of the defendant railway companies severally, or between them, or either of them, and the traffic officials, of other interested railway lines, or between them respectively, and the Southeastern Freight Association and the Mississippi Valley Southeastern Freight Association, relating to the advance in rates from Ohio and Mississippi River crossings and Nashville, Tennessee, and points with relation thereto, to southeastern points proposed to be made effective August 1st, 1908.

Fifth. That your orators may have such other and further and general relief, as the nature and circumstances of the case may require and to the Court shall seem meet and proper.

Sixth. That writ of subpœna be issued, directed to said Atlantic Coast Line Railroad Company, a corporation of the State of Vir-
ginia, having agents and maintaining offices and operating
13 lines of railway within the Southern District of Georgia; the Louisville and Nashville Railroad Company, a corporation of the State of Kentucky, operating lines of railway, and having agents and offices in the City of Atlanta, in the Northern District of Georgia, and as a lessee of the Georgia Railroad having agents and offices in the Southern District of Georgia; the Nashville, Chattanooga & St. Louis Railway, a corporation of the State of Tennessee, operating a line of railway and having offices and agents in the Northern District of Georgia; the Southern Railway Company, a corporation of the State of Virginia, operating lines of railway, and having agents and maintaining offices in the Southern District of Georgia, Cincinnati, New Orleans & Texas Pacific Railway Company,

a corporation of the State of Ohio, with its principal office in the City of Cincinnati, Ohio; commanding them, and each of them, at a certain day and under a certain penalty therein to be limited, personally to appear before this honorable Court, then and there, full, direct and perfect answer to make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived (excepting as the matters and things concerning which discovery is prayed), and to stand to, perform and abide such other order, direction and decree as may be entered against them in the premises as shall seem meet and agreeable to equity.

WIMBISH, WATKINS & ELLIS,
ALEXANDER AKERMAN,
Solicitors for Complainants.

W. A. WIMBISH,
EDGAR WATKINS,
Of Counsel.

525 Prudential Building, Atlanta, Ga.

ALEXANDER AKERMAN,
Of Counsel, Macon, Ga.

Verification.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned F. W. Hazlehurst, who, being duly sworn, deposes and says that he is the president of the F. W. Hazlehurst Company, a corporation, one of the com-
14 plainants named in the foregoing bill; that he has read said bill and knows the contents thereof; that the facts therein stated as of the knowledge of the complainants, are true, and the facts stated, upon information and belief, he verily believes them to be true.

F. W. HAZLEHURST.

Sworn to and subscribed before me this 24th day of July, 1908.

FRAMPTON E. ELLIS,
Notary Public, Fulton County, Ga.

[Indorsed:] No. 590. In United States Circuit Court for the Southern District of Georgia. The Macon Grocery Co., *et al.*, *vs.* Atlantic Coast Line R. R., *et al.* Original Bill. Filed July 27th, 1908. Cecil Morgan, Deputy Clerk.

In the Circuit Court of the United States for the Southern District of Georgia.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Bill. In Equity.

Order.

Upon reading and considering the verified bill presented in the above entitled cause, jurisdiction thereof is hereby entertained and the bill is ordered filed in the office of the Clerk of this Court, at Macon, Georgia.

It is further ordered that the defendants named in said bill, and each of them, be and appear before me at the United States Court room, in the City of Mt. Airy, Georgia, on the 29th day of July, 1908, at ten o'clock A. M., or as soon thereafter as counsel can be heard, then and there to show cause, if any they can, why an injunction *pendente lite* should not be granted, as prayed in the bill.

In the meantime, and until further order of the Court, the defendants are hereby temporarily restrained from putting into effect the advance in freight rates referred to in the bill in this cause, to be made effective August 1st, 1908, in so far as all points within the State of Georgia are concerned.

15 It is further ordered that the defendants, and each of them, be given notice of said hearing by service of a copy of this order, as speedily as may be, by delivery of a copy thereof to any officer or traffic agent of the defendants severally. Said service to be made on the defendants, Louisville & Nashville Railroad Company, and the Nashville, Chattanooga & St. Louis Railway, by delivery of a copy respectively to any officer or traffic agent of the defendants in the City of Atlanta, in the Northern District of Georgia, and by service on the Cincinnati, New Orleans & Texas Pacific Railway Company, by mailing a copy, postage prepaid, to its principal office in the Ingalls Building, Cincinnati, Ohio.

Dated and signed this 25th day of July, 1908.

EMORY SPEER,
U. S. Judge.

UNITED STATES OF AMERICA,
Southern District of Georgia:

I certify that at Macon, Bibb County, within my district, on 27th day of July, A. D. 1908, I served the within rule *ni-si* and restraining order upon the within named Southern Railway Company, by handing a copy hereof to C. L. Bunting, Commercial Agent for said Southern Railway Company, said service being made in the office

of the company on Fourth street, at Macon, and I exhibited to him the within original rule *nisi* and restraining order.

The return of:

GEORGE F. WHITE,
United States Marshal,
By F. L. RILEY, *Deputy.*

Dated and signed at Macon Ga., this July 27th, 1908.

Filed July 28th, 1908.

CECIL MORGAN,
Deputy Clerk.

[Indorsement:] No. 590. In U. S. Circuit Court, Western Division, Southern Dist. of Ga., Macon Grocery Company, *et al., vs.* Atlantic Coast Line R. R. Co., *et al.* Rule *ni-si* etc. Filed July 27th, 1908. Cecil Morgan, Deputy Clerk.

UNITED STATES OF AMERICA,
Southern District of Georgia:

I certify that at Savannah, Chatham County, Georgia, within my district, on the 28th day of July, 1908, I served the within
16 rule *nisi* and restraining order on the within named Atlantic Coast Line Railroad Company, by handing a copy hereof to J. N. Brand, general superintendent for said Atlantic Coast Line Railroad Company, said service being made in the office of the company, on Liberty Street East, at Savannah, and I exhibited to the said superintendent the within rule *ni-si* and restraining order.

[Indorsed:] The return of George F. White, United States marshal. By Joseph F. Doyle, deputy. Dated at Savannah, Georgia, this 28th day of July, A. D. 1908. Filed July 29th, 1908. Cecil Morgan, Deputy Clerk.

Equity Subpœna to Appear and Answer.

UNITED STATES OF AMERICA,
Western Division, Southern District of Georgia:

MACON GROCERY COMPANY ET AL., Complainants,
and
ATLANTIC COAST LINE RAILROAD CO. ET AL., Defendants.

In Equity. Bill, etc. Filed July 27th, 1908.

The President of the United States of America to the Atlantic Coast Line Railroad Company, the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway, the Southern Railway Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, Greeting:

For certain causes offered before the Judges of the Circuit Court of the United States for the Southern District of Georgia, in equity,

you, and each of you, are hereby commanded and strictly enjoined, that laying all other matter aside, and notwithstanding any other excuse, you personally be and appear at the Clerk's office of the said Court, in the City of Macon, at rules, to be had on the first Monday in September next, to answer to those things which shall then and there be objected to you in a bill of complaint, and to do further and receive what the said Court shall have considered in that be-
17 half, and this you may in nowise omit under penalty of five hundred dollars, and have here this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of July, in the year of our Lord one thousand nine hundred and eight.

CECIL MORGAN,
Deputy Clerk.

MEMORANDUM.—The defendants are to enter their appearance in the suit above stated in the clerk's office on or before the day at which this writ of subpœna is returnable; otherwise the bill may be taken *pro confesso*.

CECIL MORGAN,
Deputy Clerk.

(Indorsement:) In the Circuit Court of the United States for the Western Division of the Southern District of Georgia. September rules, 1908. Macon Grocery Co., *et al.*, complainants, and Atlantic Coast Line R. R. Co., *et al.*, defendants. In equity. Original subpœna in equity. Filed 27th day of July, A. D., 1908. Cecil Morgan, Deputy Clerk.

Marshal's Returns.

UNITED STATES OF AMERICA,
Southern District of Georgia:

I certify that at Macon, Bibb County, within my district, on 27th day of July, A. D. 1908, I served the within subpœna in equity upon the within named Southern Railway Company by handing a copy hereof to C. L. Bunting, commercial agent for said Southern Railway Company; said service being made in the office of the company on Fourth Street, at Macon, and I exhibited to him the within original subpœna.

The return of:

GEORGE F. WHITE,
United States Marshal,
By F. L. RILEY, *Deputy.*

Dated at Macon, Georgia, this July 27th, 1908.

UNITED STATES OF AMERICA,
Southern District of Georgia:

I certify that at Savannah, Chatham County, Georgia, within my district, on the 28th day of July, A. D. 1908, I served the
18 within subpœna in equity on the within named Atlantic Coast Line Railroad Company, by handing a copy hereof to J. N. Brand, general superintendent for said Atlantic Coast Line Railroad Company, said service being made in the office of the company, on Liberty Street, West, at Savannah, and I exhibited to the said superintendent the within original subpœna.

The return of:

GEORGE F. WHITE,
United States Marshal.
By JOSEPH F. DOYLE, *Deputy.*

Dated at Savannah Georgia, this 28th day of July, 1908.

Filed July 29th, 1908.

CECIL MORGAN,
Deputy Clerk.

Special Appearance of Louisville & Nashville Railroad Co.

In the Circuit Court of the United States for the Southern District of Georgia, at Macon.

MACON GROCERY COMPANY ET AL., Complainants,
versus
ATLANTIC COAST LINE RAILROAD COMPANY ET AL., Defendants.

Special Appearance of Defendant Louisville & Nashville Railroad Company.

Now comes the defendant, Louisville & Nashville Railroad Company, and enters its appearance herein for the purpose of pleading to the jurisdiction of this Court over the person of this defendant, and for no other purpose.

ED BAXTER,
HENRY L. STONE,
Solicitors for Defendant
Louisville & Nashville Railroad Company.

Dated July 29th, 1908.

[Indorsement:] No. 590. In the Circuit Court of the
19 United States for the Southern District of Georgia, at Macon. Macon Grocery Company, *et al.*, *vs.* Atlantic Coast Line Railroad Company, *et al.*, Defendants. Special appearance of defendant, Louisville & Nashville Railroad Company. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

In the Circuit Court of the United States for the Southern District of Georgia, at Macon.

MACON GROCERY COMPANY ET AL., Complainants,
versus
ATLANTIC COAST LINE RAILROAD COMPANY ET AL., Defendants.

Special Appearance of Defendant Atlantic Coast Line Railroad Company.

Now comes the defendant, Atlantic Coast Line Railroad Company, and enters its appearance herein for the purpose of pleading to the jurisdiction of this Court over the person of this defendant, and for no other purpose.

(Signed) GEO. B. ELLIOTT,
ROB'T C. ALSTON,
Solicitors for Defendant
Atlantic Coast Line Railroad Company.

Dated July 29th, 1908.

(Indorsements:) In the Circuit Court of the United States for the Southern District of Georgia, at Macon. Macon Grocery Company, *et al.*, *versus* Atlantic Coast Line Railroad Company, *et al.*, defendants. Special appearance of defendant, Atlantic Coast Line Railroad Company. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

20 *Special Appearance — N., C. & St. L. Ry.*

In the Circuit Court of the United States for the Southern District of Georgia, at Macon.

MACON GROCERY COMPANY ET AL., Complainants,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL., Defendants.

Special Appearance of Defendant Nashville, Chattanooga & St. Louis Railway.

Now comes the defendant, Nashville, Chattanooga & St. Louis Railway, and enters its appearance herein for the purpose of pleading to the jurisdiction of this Court over the person of this defendant, and for no other purpose.

CLAUDE WALLER,
J. D. B. DE BORD,
JOHN L. TYE,
Solicitors for Defendant Nashville,
Chattanooga & St. Louis Railway.

Dated July 29th, 1908.

[Indorsement:] No. 590. In the Circuit Court of the United States for the Southern District of Georgia, at Macon. Macon Grocery Company, *et al., vs.* Atlantic Coast Line Railway Company, *et al.* Special appearance — N., C. & St. L. Ry. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

21 *Plea to Jurisdiction of C., N. O. & T. P. Ry. Co.*

In the Circuit Court of the United States for the Southern District of Georgia. In Equity.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Plea to the Jurisdiction by the Cincinnati, New Orleans and Texas Pacific Railway Company, One of the Defendants in the Above Stated Cause.

The Cincinnati, New Orleans and Texas Pacific Railway Company, one of the above named defendants, specially appearing under protest for the purpose of this plea, and for no other, say:

That it is not a corporation organized under the laws of the State of Georgia, nor is it a citizen or inhabitant of the State of Georgia, nor does it reside therein; but that it is a corporation organized and existing under the laws of the State of Ohio, and is an inhabitant of the said State of Ohio residing at Cincinnati in the Southern District of the State of Ohio, and having its headquarters and principal offices at Cincinnati in said Southern District of Ohio, where its corporate meetings are held and its corporate business transacted.

Wherefore, insisting upon its exemption from suit in this Court, it says that not this Court, but the Circuit Court of the United States for the Southern District of Ohio has jurisdiction of its person.

Wherefore, this defendant humbly prays that this cause and the said restraining order to show cause be abated and quashed as to it.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By T. C. POWELL, *Vice-President.*

We humbly certify that in our opinion the foregoing plea is well founded in point of law.

ED BAXTER,
EDMOND COLSTON,
SANDERS McDANIEL,
CLAUDIAN B. NORTHROP,
Counsel for the Cincinnati, New Orleans and Texas Pacific Railway Company.

22 STATE OF GEORGIA,
County of Habersham:

T. C. Powell, being duly sworn, deposeth and saith on oath that he is vice-president of the said Cincinnati, New Orleans and Texas Pacific Railway Company, and that the foregoing plea is true in point of fact and is not interposed for delay.

T. C. POWELL.

Sworn to and subscribed before me this 29th day of July, 1908.

J. R. McCONNELL,
N. P. and J. P. Habersham County, Ga.

[Indorsed:] No. 590. U. S. Circuit Court, Western Division, So. Dist. of Georgia. Macon Grocery, *et al., vs.* Atlantic Coast Line R. R. Co., *et al.* Plea to Jurisdiction of C., N. O. & T. P. Ry. Co. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Plea to the Jurisdiction by the Atlantic Coast Line Railroad Company, One of the Defendants in the Above Stated Cause.

In the Circuit Court of the United States for the Southern District of Georgia. In Equity.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

The Atlantic Coast Line Railroad Company, one of the above named defendants, specially appearing under protest for the purpose of this plea, and for no other, says:

That it is not a corporation organized under the laws of the State of Georgia, nor a citizen nor inhabitant of the State of Georgia, nor does it reside therein; but that it is a corporation organized under the laws of the State of Virginia, residing in Richmond in the Eastern District of the State of Virginia, and having its headquarters and principal offices in said Eastern District of Virginia, where its corporate business [is] transacted, and its corporate meetings are held.

Wherefore, insisting upon its exemption from suit in this Court, it says that not this Court, but the Circuit Court of the
23 United States for the Eastern District of Virginia has jurisdiction of its person.

Wherefore this defendant humbly prays that this cause and the said restraining order and order to show cause be abated and quashed as to it.

ATLANTIC COAST LINE RAILROAD COMPANY,
By R. A. BRAND, *Freight Traffic Manager.*

We hereby certify that in our opinion the foregoing plea is well founded in point of law.

(Signed) GEO. B. ELLIOTT,
ROB'T C. ALSTON,
Counsel for Atlantic Coast Line Railroad Company.

STATE OF GEORGIA,
County of Fulton:

R. A. Brand, being duly sworn, deposeth and saith on oath that he is the freight traffic manager of said Atlantic Coast Line Railroad Company, and that the foregoing plea is true in point of fact and is not interposed for delay.

(Signed) R. A. BRAND.

Sworn and subscribed to before me this 28th day of July, 1908.
[SEAL.] EDGAR A. NEELY,
Notary Public, Fulton County, Georgia.

[Indorsement:] No. 590. In the Circuit Court of the United States for the Southern District of Georgia. Macon Grocery Company *versus* Atlantic Coast Line Railroad Company, *et al.* Plea to the Jurisdiction by the Atlantic Coast Line Railroad Company, one of the Defendants. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

24 *Plea to the Jurisdiction.*

In the Circuit Court of the United States for the Southern District of Georgia, at Macon.

MACON GROCERY COMPANY ET AL., Complainants,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL., Defendants.

The defendant, Louisville & Nashville Railroad Company, specially appearing under protest for the purpose of this plea and no other, says that it is not and was not at the institution of this suit a corporation organized or existing under the laws of the State of Georgia nor a citizen nor inhabitant of the said State of Georgia nor of the Southern District of Georgia, nor does it reside therein, but that it is and was at the institution of this suit a corporation organized and existing under the laws of the State of Kentucky, and a citizen of said State of Kentucky, and an inhabitant of the Western District of Kentucky, residing at the City of Louisville in the said Western District of Kentucky, where its corporate meetings are held and its corporate business transacted.

This defendant further states that this suit is a civil suit, wherein the jurisdiction is not founded only on the fact that the action is between citizens of different states but is based also upon Acts of the Congress of the United States relating to interstate commerce, and alleged causes of action arising thereunder.

Wherefore, insisting upon its exemption from suit in this Court, it says that not this Court, but the Circuit Court of the United States for the Western District of Kentucky, if any Court, has jurisdiction of this defendant, and this defendant humbly prays that this cause and the restraining order and order to show cause be abated and quashed as to it.

(Signed) ED BAXTER,
HENRY L. STONE,
Solicitors for Defendant, Louisville & Nashville Railroad Company.

UNITED STATES OF AMERICA,
State of Georgia, County of Fulton, ss:

C. B. Compton makes solemn oath and says that he is traffic manager of the defendant, Louisville & Nashville Railroad
25 Company, and the only general officer of said defendant company now in Georgia, and that the foregoing plea is not interposed for delay, and that the same is true in point of fact.

(Signed) C. B. COMPTON.

Subscribed and sworn to before me by said Compton as witness my hand and seal this July 28th, 1908. My commission expires the 3d day of May, 1911.

[SEAL.] THOS. G. GLEN,
Notary Public, Fulton County, State of Georgia.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

HENRY L. STONE,
Of Counsel for Defendant, Louisville & Nashville Railroad Company.

(Indorsements:) No. 590. In the Circuit Court of the United States for the Southern District of Georgia, at Macon. Macon Grocery Company, *et al.*, *versus* Atlantic Coast Line Railroad Company, *et al.* Plea to the Jurisdiction. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Plea to the Judisdiction.

In the Circuit Court of the United States for the Southern District of Georgia, at Macon.

MACON GROCERY COMPANY ET AL., Complainants,
vs.
ATLANTIC COAST LINE RAILROAD CO. ET AL., Defendants.

The defendant, Nashville, Chattanooga & St. Louis Railway, specially appearing under protest for the purpose of this plea and no other, says that it is not and was not at the institution of this suit a

corporation organized or existing under the laws of the State of Georgia, nor a citizen nor inhabitant of the said State of Georgia, nor of the Southern District of Georgia, nor does it reside therein, but that it is and was at the institution of this suit a corporation organized and existing under the laws of the State of Tennessee, and a citizen of said State of Tennessee, and an inhabitant of the
26 Middle District of Tennessee, residing at the City of Nashville in the said Middle District of Tennessee, where its corporate meetings are held and its corporate business transacted.

The defendant further states that this suit is a civil suit, wherein the jurisdiction is not founded only on the fact that the action is between citizens of different States but is based also upon Acts of the Congress of the United States relating to interstate commerce, and alleged causes of action arising thereunder.

Wherefore, insisting upon its exemption from suit in this Court, it says that not this Court, but the Circuit Court of the United States for the Middle District of Tennessee, if any Court, has jurisdiction of this defendant, and this defendant humbly prays that this cause and its restraining order, and order to show cause be abated and quashed as to it.

(Signed) CLAUDE WALLER,
J. D. B. DEBOW,
JOHN TYE,
Solicitors for Defendant, Nashville, Chattanooga & St. Louis Railway.

UNITED STATES OF AMERICA,
State of Georgia, County of Fulton, ss:

H. F. Smith makes solemn oath and says that he is Vice President of the defendant, Nashville, Chattanooga & St. Louis Railway and the only general officer of said defendant company now in the State of Georgia, and that the foregoing plea is not interposed for delay, and that the same is true in point of fact.

(Signed) H. F. SMITH.

Subscribed and sworn to before me by said Smith, as witness my hand and official seal this July 28th, 1908. My commission expires the 3d day of May, 1911.

[SEAL.] (Signed) THOS. S. GLEN,
Notary Public, Fulton County, State of Georgia.

We hereby certify that in our opinion the foregoing plea is well founded in point of law.

(Signed) CLAUDE WALLER,
J. D. DEBOW,
Of Counsel for Defendant, Nashville, Chattanooga & St. Louis Railway.

27 (Indorsements:) No. 590. In the Circuit Court of the United States for the Southern District of Georgia, at Macon. Macon Grocery Company, *et al.*, *versus* Atlantic Coast Line Railroad Company, *et al.* Plea to the Jurisdiction. N. C. & St. L. Ry. Filed August 6th, 1908. (Signed) Cecil Morgan, Deputy Clerk.

[*Demurrer.*]

In the Circuit Court of the United States for the Southern District of Georgia, at Macon.

MACON GROCERY COMPANY ET AL., Complainants,
vs.
ATLANTIC COAST LINE RAILROAD CO. ET AL., Defendants.

The Demurrer of the Defendants, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company.

The Defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill of complaint to be true in such manner and form as the same are therein set forth and alleged, and without waiving their pleas to the jurisdiction of the Court over the defendants or either of them, heretofore overruled and to which the complainants' demurrers have been sustained by the Court, but still relying and insisting on their said pleas, do demur thereto, and for cause of demurrer show that the complainants have not, nor has either of them, in and by virtue of their said bill of complaint made or stated any such cause of action as is within the jurisdiction of this Court or as doth or ought to entitle them to any relief in this Court of Equity, or to any such relief as is therein sought and prayed for:

I. It appears by the allegations of said bill of complaint this Court has no jurisdiction of these defendants or either of them.

II. The facts stated in said bill of complaint show no cause of action of which the Circuit Court of the United States for
28 the Southern District of Georgia has jurisdiction in equity, and there is no equity in the said bill.

III. It is not competent for any of the complainants or any individuals or individual having dealings with the railway companies to raise the question in the Courts as to the rates of charge for interstate transportation described in the bill of complaint (the same having been established by law), without some representative of the public being a party to the record, or without the Interstate Commerce Commission having passed upon the said rates in the first instance, as provided by the Act to Regulate Commerce.

IV. It appears from the allegations in said bill of complaint that the complainants have not made or stated such cause of action as entitles them or either of them to the relief that is therein sought and prayed for, against these defendants or either of them in a Court of Equity of the United States.

V. It does not appear from the allegations in said bill of complaint that the same is instituted or filed under or by authority of any statute of the United States, and the same does not set forth facts showing that the complainants or either of them are entitled

to maintain any bill of complaint in equity against these defendants or either of them under any law or Act of Congress of the United States.

VI. It appears from and upon the face of said bill of complaint that the said complainants have each an adequate and complete remedy at law, for the several alleged wrongs, in said bill of complaint set up against these defendants and each of them.

VII. It appears from and upon the face of said bill of complaint that the Interstate Commerce Commission under and by virtue of the provisions of "An Act to Regulate Commerce," approved February 4th, 1887, and the amendments thereto, has original and exclusive jurisdiction of the matters and things set up and complained of in said bill of complaint, except those mentioned in the next paragraph of this demurrer.

VIII. It appears by the allegations of the said bill of complaint and upon the face thereof that, in so far as the same is
29 brought to restrain and enjoin an alleged contract, combination, or conspiracy by or between defendants, alleged to be in restraint of trade or commerce among the several States, or alleged to have been made by or between the defendants to monopolize or as an attempt on their part to monopolize any such trade or commerce to any extent, in alleged contravention of "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," approved July 2d, 1890, commonly known as the Sherman Anti-Trust Act, neither the complainants, or either of them, nor any other individuals or corporations, have any cause of action or right to institute or maintain any action to obtain any relief in equity, or in any Court of Equity, such right of action being vested exclusively in the United States, to be instituted by the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, and not otherwise, and all individuals and corporations are restricted to their remedies at law as provided in said act.

IX. The allegations in said bill of complaint do not show that the complainants or either of them are entitled to institute or maintain this action against these defendants or either of them under or by virtue of "An Act to Regulate Commerce," approved February 4th, 1887, and the amendments thereto.

X. The granting of the injunction sought and prayed for in said bill of complaint would be in effect to fix at existing or prevailing maximum rates, the rates to be charged by defendants and each of them on August 1st, 1908, and thereafter, upon the classes of freight and commodities from and to the points stated in said bill of complaint, thus usurping the power and right committed to the defendant carriers to fix and publish schedules and tariffs of their rates upon such classes and commodities from and to the points aforesaid and file the same with the Interstate Commerce Commission, in the manner provided by said "Act to Regulate Commerce," and the amendments thereto, subject to the power of said Commission, on a complaint made, after full hearing, as therein provided, to prescribe what will be just and reasonable rates to be thereafter observed in such case

or for like services, as the maximum to be charged, should said Commission be of opinion the rates or charges complained of are unjust or unreasonable, or unjustly discriminatory or unduly
30 preferential or prejudicial, otherwise in violation of any of the provisions of the said act or the amendments thereto, and to award against the offending carriers or carrier reparation in damages to the complainant or complainants for such violation as provided in such act as amended; and to grant the relief as prayed for by complainants would be the exercise by this Court of legislative, and not judicial power, and to pass such a decree is and would be beyond the power, authority and jurisdiction of this Court.

Wherefore and for divers other good causes of demurrer appearing in said bill of complaint, these defendants demur thereto and humbly demand the judgment of this Court whether they shall be compelled to make any further or any other answer to said bill, and pray to be dismissed with their costs and charges in this behalf most wrongfully sustained.

(Signed) ED. BAXTER,
JOHN L. TYE,
J. D. DE BOW,
CLAUDIUS B. NORTHRUP,
EDWARD COLSTON,
HENRY L. STONE,
GEO. B. ELLIOTT,
McDANIEL, ALSTON & BLACK,
Solicitors for Defendants.

UNITED STATES OF AMERICA,
State of Kentucky, County of Jefferson, ss:

G. E. Evans appeared before me and makes solemn oath and says that he is 4th Vice President of the Louisville & Nashville Railroad Company, one of the defendants, and that the foregoing demurrer is not interposed for delay.

(Signed) G. E. EVANS,
Fourth Vice President.

Subscribed and sworn to before me, as witness my hand and official seal, this 27th day of July, 1908. My commission expires on the 29th day of January, 1910.

[SEAL.] (Signed) G. W. OLMSTEAD,
Notary Public for Jefferson County, Ky.

I do hereby certify that in my opinion the foregoing demurrer is well grounded in point of law.

[SEAL.] (Signed) ED BAXTER,
Of Counsel for Defendants.

31 (Indorsements:) No. 590. In the Circuit Court of the United States for the Southern District of Georgia, at Macon. Macon Grocery Company, *et al., vs.* Atlantic Coast Line Railroad Company, *et al.* Demurrer of the Atlantic Coast Line Railroad Company, *et al.* Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Response to the Rule to Show Cause.

In the Circuit Court of the United States for the Southern District of Georgia. In Equity.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD COMPANY.

Response to the Rule to Show Cause.

By way of response to the rule to show cause issued July 25th, 1908, Southern Railway Company respectfully files the attached plea to the jurisdiction.

Plea to the Jurisdiction by Southern Railway Company—Response to the Rule to Show Cause.

In the Circuit Court of the United States for the Southern District of Georgia. In Equity.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Plea to the Jurisdiction by Southern Railway Company, One of the Defendants in the Above Stated Cause.

Southern Railway Company, one of the above named defendants, specially appearing under protest for the purpose of this plea, and for no other, says:

That it is not a corporation organized under the laws of the State of Georgia, nor is it a citizen or inhabitant of the State of
32 Georgia, nor does it reside therein; but that it is a corporation organized and existing under the laws of the State of Virginia and is an inhabitant of the said State of Virginia, residing in Richmond, in the Eastern District of the State of Virginia and having its headquarters and principal offices at Richmond, in said Eastern District of Virginia, where its corporate meetings are held and its corporate business transacted.

Wherefore, insisting upon its exemption from suit in this Court, it says that not this Court but the Circuit Court of the United States for the Eastern District of Virginia has jurisdiction of its person.

Wherefore, this defendant humbly prays that this cause and the restraining order and order to show cause be abated and quashed as to it.

SOUTHERN RAILWAY COMPANY,
By JOHN M. CULP, *Vice President.*

We hereby certify that in our opinion the foregoing plea is well founded in point of law.

CLAUDIAN B. NORTHROP,
SANDERS McDANIEL,
Counsel for Southern Railway Company.

STATE OF GEORGIA,
County of Habersham:

John M. Culp, being duly sworn, deposeth and saith on oath that he is Vice President of the said Southern Railway Company and that the foregoing plea is true in point of fact and is not interposed for delay.

JOHN M. CULP.

Sworn to and subscribed before me this 29th day of July, 1908.
J. R. McCONNELL,
N. P. & J. P., Habersham County, Ga.

[Indorsements:] U. S. Circuit Court, Western Division, So. District of Ga. Macon Grocery Company, *et al.*, *vs.* Atlantic Coast Line R. R. Co., *et al.* Response to the Rule to Show Cause. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

33 [*Telegram.*]

No. 10 Dy. F. 10 paid.
Bx Atlanta 29.

W. A. Wimbish:

Figures given in certificate yesterday covering Georgia Railroad are incorrect.

GEO. F. MONTGOMERY.
3:07 P. M.

Certificate of Geo. F. Montgomery, Sect. Ga. R. R. Commission.

OFFICE OF THE RAILROAD COMMISSION OF GEORGIA,
ATLANTA, GEORGIA, *July 28th*, 1908.

I hereby certify that the figures set out below representing earnings of the railway companies in Georgia as shown, were taken from the sworn reports filed by each line respectively in this office in accordance with the rules of the Railroad Commission. The Georgia Railroad for the month of July, 1907, to May, 1908, inclusive, made a net increase of profits over the same months for 1906-07 amounting to $7,748.72.

The Western & Atlantic Railroad from July, 1907, to May 1908, inclusive, made a net profit of $633,907.76. For the same months for 1906-07 the profits of this road were $592,475.31, and for same period 1905-06, $625,792.06.

The Central of Georgia Railway from July, 1907, to May, 1908, inclusive, made a net profit in excess of the net profit for the same months of 1906-07 of $55,290.15. The gross receipts of said company for the months above stated in 1907-08 show a decrease of $525,885.68 as compared with said months of 1906-07.

[SEAL.] GEO. F. MONTGOMERY,
Secretary R. R. Com. of Ga.

[Indorsements:] No. 570. In the Circuit Court of the United States, Western Division, Southern District of Georgia. Macon Grocery Company, *et al.*, *vs.* Atlantic Coast Line Railroad Company, *et al.* Certificate of Geo. F. Montgomery, Sec. Ga. R. R. Commission. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

34 *Affidavit of W. E. Small.*

In the United States Circuit Court for the Western Division of the Southern District of Georgia.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE R. R. CO. ET AL.

In Equity. Bill, etc.

UNITED STATES OF AMERICA,
Southern District of Georgia, County of Bibb:

Personally appeared before the undersigned, an officer duly authorized by law to administer oaths, W. E. Small, who, being first duly sworn, deposes and says: That he is general manager of the A. B. Small Co., one of the complainants named in the above entitled cause; that the said A. B. Small Co. is engaged in the wholesale business in the City of Macon, Georgia, and is a dealer in hay, grain, flour, meats and other articles upon which the increase-freight rates mentioned in the declaration filed by the carrier companies, respondents in the above entitled bill, effective Aug. 1st, 1908, are made to apply by said declaration, and which increase in freight rates the bill in this cause seeks to enjoin.

That deponent has made a careful estimate, as to the annual increase in freight rates upon the articles aforesaid, handled by the said A. B. Small Co. in its business, as aforesaid, which said estimates, — based upon the volume of the business of the said A. B. Small Co. for the previous year, and that in the opinion of the deponent, said increase in the amount of freight rates which will be paid by the said A. B. Small Co. will amount to $4619.72 *dollars* per annum, and that in the opinion of deponent said increase in freight rates upon the articles aforesaid which will be paid by the merchants in the City of Macon, Georgia, will amount to $65000.00 *dollars* per annum, and in the State of Georgia, will amount to 750,000.00 dollars per annum.

That following a conference between shippers and representatives of the railway lines in Atlanta, Georgia, during the year 1905, there were reductions in freight rates from the west to Macon, and other points in Georgia upon the above named commodities; and that under said reduction a large traffic has moved and conditions have now become adjusted to said trade, and that the opinion of deponent to change said rates, at the present time, would disturb
35 trade conditions, existing contracts being based upon said freight rates, and cause a serious loss to fall upon both the consumer and the dealer in the aforesaid commodities.

That the margin of profit to the dealer upon the aforesaid commodities is very small, and that while it would be possible for the dealer by the increasing [of] the price of the aforesaid commodities to absorb a part of said increase in freight rates, and pass the same along to the consumer, it would be impossible, at least until conditions adjusted themselves, to absorb the entire increase in said freight rates, and that by such increase a large loss would fall both upon the dealer and the consumer.

That the largest part of the supply to the State of Georgia — the aforesaid commodities, comes from points beyond the Mississippi and Ohio Rivers, and is affected by said increase in freight rates, there being no other available source of supply.

That while it is true that following the financial panic in the fall of 1907, there was a general depression in all lines of business, trade in the articles and commodities upon which it is proposed by the carriers to increase freight rates, — is improving and rapidly assuming normal conditions, and that in the opinion of deponent, with the opening of fall trade, a vast amount of tonnage in the aforesaid commodities will move from the West to the State of Georgia.

W. E. SMALL.

Sworn to and subscribed before me this 28th day of July, 1908.

WM. E. MARTIN, JR.,
Notary Public, Bibb County, Ga.

[Indorsements:] No. 570. In the Circuit Court of the U. S. for the Western [Division] of the Southern Dist. of Georgia. Macon Grocery Company, *et al.*, *vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of W. E. Small. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Affidavit of A. P. Morgan.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned, A. P. Morgan, who being sworn on oath, says that he is a citizen and resident
36 of the County of Fulton, in the State of Georgia; that he is engaged in the business of buying and selling grain, hay, flour and feedstuff, and is connected with the business of A. P. Mor-

gan Grain Co., that said A. P. Morgan Grain Co. business during the year 1907 shipped products that would take the advance sought to be enforced from and after August 1st, 1908, amounting to 34,500,000 pounds, which at the advance sought to be enacted would cost in additional freight per annum said A. P. Morgan Grain Co. the sum of $6900.00; that affiant is familiar with the cost and selling of the products handled by said A. P. Morgan Grain Co., and that it would be impossible for said A. P. Morgan Grain Co. to absorb the advance in rates sought to be put in force; that said A. P. Morgan Grain Co. would have to lose a portion of said advance and some portion thereof would have to be charged to the public.

A. P. MORGAN.

Sworn to and subscribed before me this 28 day of July, 1908.
[SEAL.] S. C. KLUELUGHTER,
Notary Public Fulton County, Ga.

[Indorsements:] No. 570. In the Circuit Court of the United States, Western Division, So. District of Ga. Macon Grocery Company, *et al.*, *vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of A. P. Morgan. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

37 *Information Issue No. 517.*

Freight traffic of each of the following lines, viz:
Atlantic Coast Line Railroad Company.
Central of Georgia Railway Company.
Louisville & Nashville Railroad Company.
Southern Railway Company.

Effective August 1, 1908.

Classes B, C, D, and F; Fresh Meats, C. L. Grain, Grain Products and Hay and Packing House Products, from Ohio and Mississippi River Crossings, Nashville, Tenn., and Points with Relation Thereto to Southeastern Points:

Each of the initial carriers named above announces separately for itself its intention of advancing present rates from Ohio and Mississippi River crossings, Nashville, Tenn., and points made with relation thereto to Southeastern points as follows:

Class B	3	cents per one hundred pounds.
Class C	2	cents per one hundred pounds.
Class D	2	cents per one hundred pounds.
Class F	4	cents per barrel.
Fresh meats C. L.	3	cents per one hundred pounds.
Grain and Hay	2	cents per one hundred pounds.
Packing house products	3	cents per one hundred pounds.

Supersedeas in conflict Southeastern Freight Tariff No. 4—S. E. and rate issues Nos. 363, 1419, 2706, 3446, 5193, 6288, 10340 and 12851, and information issues Nos. 137 and 244.

JAMES MENZIES,
G. F. A., 2nd Div.,
J. W. PERRIN,
G. F. A., 1st Div.,
A. C. L. R. R. Co.
C. T. AIREY,
F. T. M., Central of Georgia Railway Co.
D. M. GOODWYN,
G. F. A., L. & N. R. R. Co.
LINCOLN GREEN,
F. T. M., Southern Railway Co.

The initial carriers reserve the right to route through to destination property delivered them for transportation at the through rates shown in this tariff.

38 The rates, rules and regulations in this tariff are the separate rates, rules and regulations of each of the initial carriers named and their connections, and are compiled and published by me as agent of each of said carriers from the separate written declaration of each of said initial carriers.

E. H. HINTON,
Chairman Southeastern Freight Association.

Atlanta, Ga., June 26, 1908. Declaration No. 6732.

Affidavit of E. L. Adams.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned E. L. Adams, who being sworn, on oath says that he is a citizen and resident of the County of Fulton, in the State of Georgia; that he is engaged in the business of buying and selling groceries at wholesale and is connected with the business of Adams Whitney Co., that said wholesale grocery business during the year 1907 shipped products that would take the advance sought to be enforced from and after Aug. 1st, 1908, amounting to 2,288,802 pounds, which at the advance sought to be enacted would cost in additional freight per annum said Adams, Whitney Co. the sum of $457.77; that affiant is familiar with the cost and selling of the products handled by said Adams, Whitney Co., and that it would be impossible for said Adams, Whitney Co. to absorb the advance in rates sought to be put in force; that said Adams, Whitney Co. would have to lose a portion of said advance and some portion thereof would have to be charged to the public.

E. L. ADAMS.

Sworn to and subscribed before me this 27 day of July, 1908.
[SEAL.] FRAMPTON E. ELLIS,
Notary Public, Fulton County, Ga.

[Indorsements:] No. 570. In the Circuit Court of the United States, Western Division, So. District of Ga. Macon Grocery Company, *et al., vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of E. L. Adams. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

39 *Affidavit of W. S. Duncan.*

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned, W. S. Duncan, who being sworn, on oath, says that he is a citizen and resident of the County of Fulton, in the State of Georgia; that he [is] engaged in the business of buying and selling grain, hay, flour and mill products, and is connected with the business of W. S. Duncan & Co., that said firm's business during the year 1907 and six months of 1908 shipped products that would take the advance sought to be enforced from and after August 1st, 1908, amounting to 60,669,693 pounds, which at the advance sought to be enacted would cost in additional freight per annum said freight the sum of $12,133.93; that affiant is familiar with the cost and selling of the products handled by said firms, and that it would be impossible for said firm to absorb the advance in rates sought to be put in force; that said firm would have to lose a portion of said advance and some portion thereof would have to be charged to the public.

W. S. DUNCAN.

Sworn to and subscribed before me this 27 day of July, 1908.
[SEAL.] FRAMPTON E. ELLIS,
Notary Public, Fulton County, Ga.

[Indorsements:] No. 570. In the Circuit Court of the United States, Western Division, So. District of Ga. Macon Grocery Company, *et al., vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of W. S. Duncan. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Affidavit of A. C. Woolley.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned, A. C. Woolley, who being sworn, on oath says that he is a citizen and resident of the County of Fulton, in the State of Georgia; that he is engaged in the business of buying and selling grain and is connected with the business of A. C. Woolley & Co., that said firm's business during the year

1907 shipped products that would take the advance sought to
40 be enforced from and after August 1st, 1908, amounting to 7,800,000 pounds, which at the advance sought to be enacted would cost in additional freight per annum said firm the sum of $1560.00; that affiant is familiar with the cost and selling of the products handled by said A. C. Woolley & Co., and that it would be impossible for said firm to absorb the advance in rates sought to be put in force; that said firm would have to lose a portion of said advance and some portion thereof would have to be charged to the public.

A. C. WOOLLEY.

Sworn to and subscribed before me this 27 day of July, 1908.
[SEAL.] FRAMPTON E. ELLIS,
Notary Public, Fulton County, Ga.

[Indorsements:] No. 570. In the Circuit Court of the United States, Western Division, So. District of Ga. Macon Grocery Company, *et al., vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of A. C. Woolley. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Affidavit of R. W. Davis.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned, R. W. Davis, who being sworn, on oath says that he is a citizen and resident of the County of Fulton, in the State of Georgia; that he is engaged in the business of buying and selling grain and provisions and is connected with the business of R. W. Davis & Co.; that said firm's business during the year 1907 shipped products that would take the advance sought to be enforced from and after August 1st, 1908, amounting to approximately 2,000,000 pounds of flour, 3,000,000 pounds of mill products, which at the advance sought to be enacted would cost in additional freight per annum said firm the sum of $1,000.00; that affiant is familiar with the cost and selling of the products handled by the said firm, and that it would be impossible for said firm to absorb the advance in rates sought to be put in force; that said firm would have to lose a portion of said advance and some portion thereof would have to be charged to the public.

R. W. DAVIS.

41 Sworn to and subscribed before me this 27 day of July, 1908.
[SEAL.] FRAMPTON ELLIS,
Notary Public, Fulton County, Ga.

[Indorsements:] No. 570. In the Circuit Court of the United States, Western Division, So. District of Ga. Macon Grocery Company, *et al., vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of R. W. Davis. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Affidavit of F. B. Coleman.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned, F. B. Coleman, who being sworn, on oath says that he is a citizen and resident of the County of Fulton, in the State of Georgia; that he is engaged in the business of buying and selling flour, meat, lard and meal, and is connected with the business of McCord, Stewart Co.; that said McCord, Stewart Co.'s business during the year 1907 shipped products that would take the advance sought to be enforced from and after August 1st, 1908, amounting to 23,429,536 pounds, which at the advance sought to be enacted would cost in additional freight per annum said [McCord, Stewart Co.] the sum of $4685.81; that affiant is familiar with the cost and selling of the products handled by said McCord, Stewart Co., and that it would be impossible for said McCord, Stewart Co., to absorb the advance in rates sought to be put in force; that said McCord, Stewart Co. would have to lose a portion of said advance and some portion thereof would have to be charged to the public.

McCORD, STEWART CO.,
Per F. B. COLEMAN,
Mgr. Purchasing Dept.

Sworn to and subscribed before me this 28 day of July, 1908.
[SEAL.] G. M. STOKES,
Notary Public, Fulton County, Ga.

[Indorsements:] No. 570. In the Circuit Court of the United States, Western Division, So. District of Ga. Macon Grocery
42 Company, *et al.*, *vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of F. B. Coleman. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Flour	16,742,724
Meat	321,820
Meal	5,367,792
Lard	997,200
	23,429,536

Affidavit of Cone W. Maddox.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned, Cone W. Maddox, who being sworn, on oath says that he is a citizen and resident of the County of Fulton, in the State of Georgia; that he is engaged in the business of buying and selling flour, and is connected with

the business of J. J. Maddox Co.; that said firm's business during the year 1907 shipped products that would take the advance sought to be enforced from and after August 1st, 1908, amounting to 5,000,000 pounds, which at the advance sought to be enacted would cost in additional freight per annum said firm the sum of $1,000.00; that affiant is familiar with the cost and selling of the products handled by said firm, and that it would be impossible for said firm to absorb the advance in rates sought to be put in force; that said firm would have to lose a portion of said advance and some portion thereof would have to be charged to the public.

CONE W. MADDOX.

Sworn to and subscribed before me this 27 day of July, 1908.
[SEAL.] FRAMPTON E. ELLIS,
Notary Public, Fulton County, Ga.

[Indorsement:] In the Circuit Court of the United States, Western Division, So. District of Ga. Macon Grocery Company, *et al.*, *vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of Cone W. Maddox. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

43 *Affidavit of Thos. E. Rogers.*

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned, —— ——, who being sworn, on oath says that he is a citizen and resident of the County of Fulton, in the State of Georgia; that he is engaged in the business of buying and selling flour, meal, meat, lard and is connected with the business of Kelly Bros. Co.; that said Kelly Bros. Co.'s business during the year 1907 shipped products that would take the advance sought to be enforced from and after August 1st, 1908, amounting to 13,685,927 pounds, which at the advance sought to be enacted would cost in additional freight per annum said company the sum of $2,737.18; that affiant is familiar with the cost and selling of the products handled by said company, and that it would be impossible for said company to absorb the advance in rates sought to be put in force; that said company would have to lose a portion of said advance and some portion thereof would have to be charged to the public.

THOS. E. ROGERS.

Sworn to and subscribed before me this 27 day of July, 1908.
[SEAL.] FRAMPTON E. ELLIS,
Notary Public, Fulton County, Ga.

[Indorsements:] No. 570. In the Circuit Court of the United States, Western Division, So. District of Ga. Macon Grocery Company, *et al.*, *vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of Thos. E. Rogers. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

44 *Affidavit of W. E. Newill.*

In the Circuit Court of the United States for the Southern District of Georgia.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD CO. ET AL.

Bill. In Equity.

STATE OF GEORGIA,
Fulton County:

Personally appeared before the undersigned authority, W. E. Newill, who being first duly sworn, on oath says: That on the days hereinafter named there met in the City of Atlanta, in the County of Fulton, a joint conference committee, composed of J. G. Oglesby, J. K. Orr, Samuel D. Jones, W. E. Newill, R. F. Maddox, Louis Gholstin and E. M. Hudson, who were appointed to attend said conference by the Mayor of the City of Atlanta;

That at said conference there were also present, representing the railroads, H. F. Smith, representing the Nashville, Chattanooga & St. Louis Railway Company; J. M. Culp, representing the Southern Railway Company; T. C. Powell, representing the Southern Railroad Company; A. R. Lawton and W. A. Winburn, representing the Central of Georgia Railway Company; E. F. Cost, representing the Seaboard Air Line Railroad Company; Thomas K. Scott and A. G. Jackson, representing the Georgia Railroad Company; A. R. Smith, representing the Atlanta & West Point Railroad Company, and S. F. Parrott, representing the Georgia Southern & Florida Railway Company;

Said conference committee was organized by the election of J. G. Oglesby as Chairman, and met the first time on the 15th day of November, 1904, in the City of Atlanta. The proceedings of said conference were taken down stenographically and were published in a pamphlet or book entitled "Conference Between a Committee by the City Council of Atlanta, and Traffic Officials of the Initial Atlanta Lines Held at the Piedmont Hotel, Atlanta, Ga., Nov. 15 and 16 and Dec. 6 and 7, 1904.

Affiant attended the meetings of said conference, and, refreshing his memory from the printed report thereof, says: That, during the course of said conference the committee of citizens expressed
45 the desire of the City of Atlanta and territory related thereto, and freely discussed with the traffic officials and [an] adjustment with reference to the differences growing out of the traffic situation in Atlanta and related territory. From the printed report of said conference, and the recollection of affiant, affiant says that the following statements among others were made, and the following proceedings among others had:

On the first day of the conference, and at the very beginning

thereof Mr. W. A. Winburn said: Our idea was that it was perhaps best to come to you without any pre-arranged plan of that sort, and to ask you gentlemen to go with us into the details of your troubles, and then it would be time enough, and that we would be in better shape to determine what could be done, and in what manner. I make the suggestion, therefore, that your committee present, for the information of the railroad representatives, your view of the matter, and what your wishes are." (Record of Conference page 5.)

In reply thereto Mr. J. G. Oglesby, the Chairman, said in part: "We are commissioned to you from the City Council, and our instructions from the City Council, as I understand it, are to lay before you matter that was placed in our hands for our consideration; and our mission is a mission of conference.

* * * * * * *

Referring to the discriminations that Atlanta suffers; they are not new in our expression of them to you gentlemen; they have been in existence here a long time. We have suffered, and we are now suffering. The manufacturing interest- of this town have not grown as they should have grown. The jobbing interest- of this town have not grown as they should have grown."

* * * * * * *

Atlanta, as you gentlemen know better than we, does pay now, and has always paid, for over a quarter of a century, freight rates thirty to sixty per cent.—in some instances less than thirty, and in other instances more than sixty per cent.—in excess of other towns, with which we feel we ought to be placed on an equality; and we want your consideration along that line."

We feel that the time has come when those freight rates, if not all, at least a large portion of them, should meet with a revision—should meet with a reduction."

* * * * * * *

46 The matter for consideration is this:

Rates of freight from the West not in excess of those now in effect to Birmingham Ala.

A relative reduction of rates from the East.

Forwarding and re-billing privileges.

Necessary competitive commodity rates.

Such rates on raw material as will encourage and build up our manufacturing industries."

(Record of Conference pp. 5, 10 inclusive.)

The discussion at this conference included references to common points territory and cities and towns throughout the State of Georgia. Mr. Winburn said: "There is in the Southeast, as we term this section of Georgia and Alabama, a number of so-called common or rate-making points—rate-basing points Atlanta, Athens, Augusta, Columbus, Albany, Chattanooga, Macon, Birmingham, Rome, Anniston, and on the outer edges are Richmond, Lynchburg, New Orleans, Memphis, Nashville, Louisville and Cincinnati." (Record of Conference p. 12.)

Mr. Winburn further asked: "If the rates from the West to

Atlanta were made the same as they are to Birmingham, is it your idea that the railroads should reduce those rates without effecting the rates to the surrounding points, to remove your discrimination; or, is it your idea that, if we were to reduce the rates to Atlanta, we should also reduce the rates, say to Rome, and to Anniston, on the one side, and to Macon, Augusta, Columbus, Albany, and points in that section of country to the east of us?" (Record of Conference pp. 13 and 14.)

Mr. Winburn asked a similar question, as is shown in the printed record, page 44. Mr. Winburn further says: A change in the rates from the east to Atlanta, carrying with it a change to Augusta, Athens, Macon, Columbus, Albany and that territory, is going to affect every carrier that serves the Eastern market." (Record of Conference, p. 125.)

The conference adjourned at the conclusion of the session on the 16th of November, 1904, until December 6th, 1904. Pending the adjournment the traffic officials consulted with their presidents, and the presidents of other roads, with the view of reporting back after said consultation, and on December 6th the result of the con-
47 ference between the railroad officials was reported, which result was embodied in the tariff made effective February 1st, 1905. In the course of the report Mr Culp said: "It was the consensus of opinion that the reduction- to Atlanta from the West would carry with them corresponding reductions to these points, which have been specially related to Atlanta, such as Macon, and Athens, and Augusta, and Columbus; and that the rates from the East to Atlanta being reduced in line with the reductions from the West to Atlanta, there would be some reduction to some points in the Southeast to some of the points in the Southeast, from the East the reduction would not be as great as the reduction to Atlanta; not all the points in the Southeast would be reduced from the East; some would not be reduced at all. It leaves as it is proposed or suggested, a lower rate from the East to Atlanta, than to Birmingham, Montgomery and Selma." (Record of Conference, p. 206.)

Mr. Culp further said: "Now, intermediate points, there are some points, competitive, to which the rates bore a fixed relation to the rates to Atlanta, or some other point that, in itself, has a fixed relation to Atlanta, and those would be correspondingly reduced." (Record of Conference, pp. 209 and 210.)

The discussion was full, free, frank, and friendly.

Mr. H. F. Smith said: "I feel warranted in stating that the representatives of the Atlanta transportation lines are gratified at being afforded this opportunity to dispassionately discuss with you the matter of freight rates." (Record of Conference, p. 16.)

The Citizens' Committee did not ask for any other than a reasonable rate. In the course of the conference Mr. Oglesby said: "If you will remember, right early in this session, I think that the chairman made the statement that this committee, no member of it and the committee as a body, would not ask the railroads to do anything, that would bring demoralization among themselves in the operation of their different lines, or that would bring about serious damage.

But don't interpret that to mean that we are not sincere in our belief that we are discriminated against. We do not believe that we pay the highest rate of freight, all things considered, of any town
48 in this part of the country." (Record of Conference, p. 110.)

The carriers represented by the traffic officials at the conference held November 15 and 16th, feeling that it was necessary to confer with their connecting lines, asked for time. Mr. Scott said: "I wanted to ask your committee if you don't feel, in view of the statement made by Mr. Winburn, the great difficulty that we ourselves will encounter if handling this question, whether from the West or from the East; that the wisest for all of us to do would be to get more time for the purpose of consulting with our connections, whose co-operation with us in anything that we may do is absolutely essential?" (Record of Conference, p. 127.)

Time was granted. In fixing the time for the next meeting Mr. Smith said: "Numerically, this is a small committee, and to secure the consideration or attention of these very important subjects by the representatives of the lines having direct and very large interests, means a committee of perhaps twenty-five or thirty, and it is almost impossible for this small committee to determine when that number of officials of interested lines may be gotten together, but it was understood, in a short discussion of the situation immediately on adjournment, that after we had finally adjourned this conference, the executive officers of some of the most important lines would be immediately communicated with, and perhaps a date suggested to them, and let them aid in arranging for the attendance, regardless, perhaps, of a good many other engagements." (Record of Conference p. 180.)

When the conference met on December 6th, 1904, Mr. Winburn reporting on behalf of the traffic officials, said:

"I have been requested to make a report on the question- that were considered by the joint committee week before last, from the standpoint of the railroads. I want to say, in the first place, that a meeting of the chief executive officials of the important Southern lines was called by the chief officials of the Atlanta lines in New York on December 1st. In response to that call, the president of the larger lines in the South—and in speaking of the South I mean the territory east of the Mississippi River—met in New York, with the traffic officials, including the railroad committee, that met you gentlemen two weeks ago, and went very thoroughly and patiently into many of the details, that have been discussed at various times. I don't
49 know when the president- of these railroads have gotten together, and devoted as much time to any one subject as they did to the subject of the Atlanta situation, and the rates that bear upon this situation. You must remember, as was hinted at in the earlier meetings a consideration of the Atlanta rates involves a great many things; it involves the interest of the eastern and the western carriers; the interest of the communities that are represented by the lines, some of which do not reach Atlanta; therefore, there were a number of conflicting interests to be considered, and reasonably

served. The meeting in New York was not prepared to go in detail into the commodity rate situation. There was not sufficient information—could not very well be—before the meeting, to enable it to go into the many commodity rates that apply to the various points in the Southeast. It was thought best to leave that matter for the consideration of the traffic officials, as the result of the action of the executives upon the class rates." (Record of Conference pp. 199 and 200.)

* * * * * * *

"The reduction proposed on first class *in* [is] nine cents. The reductions are not uniform throughout the first six classes, the reductions on sixth-class being five cents, and on third-class only three cents. The uniform reduction on meat, grain and flour is two cents per hundred pounds. The rates proposed from Cincinnati, Louisville and the other Ohio River crossings of the first six classes are proposed on the first six classes from Baltimore. The lower classes are not the same, and have not heretofore been the same. The reductions on the first six classes from Baltimore are just the same as they are from Cincinnati and Louisville. On Class A the present rate from Baltimore is twenty-three cents, and no reduction is proposed. No reduction is proposed on meat, or flour, or grain, or beer rates." (Record of Conference p. 202.)

The adjustments and reductions reported by Mr. Winburn are not set out herein, but will show in the new tariff that went into effect February 1st, 1905. In addition to reductions reported by Mr. Winburn, Mr. Culp said: "It might be well to add to what Mr. Winburn has stated, that it is proposed to take the commodity list, and make a revision in line with the reductions that have been specifically made by the presidents and corresponding officers of the various lines. I don't think there is any doubt but what there will be a reduction made on a considerable number of commodities, but we haven't, as Mr. Winburn has suggested, had time to go into them and to revise them in line with these revisions that have already been determined upon. (Record of Conference p. 205.)

The result arrived at by the carriers and reported to this conference on December 6th was the result of competitive conditions, and after a full conference with all parties interested Mr. Smith said: "I would answer that, with the permission of my associates, by saying that those interested in the Atlanta rates reached a compromise with those not having direct interest in the Atlanta rates; I refer to other carriers, carriers whose paramount interest was with other communities. These figures that we submit here to you were considered by those other interest-, representing those other communities, and concurred in. They said: We will join you in making these proposed reductions to Atlanta. This committee, in my judgment, would not be impowered to change those rates in any respect. We would be acting in bad faith, and it might result in the lines representing other communities making corresponding change in the rates to those other points. It matters not what our adjustment might be, and how

willing we would, without controlling influences preventing, how willingly we would meet yours views. We are not empowered to do it. It would result, if we want to change these specific rates that are submitted to you, it would necessarily result in our having another conference similar to the one in New York, at which all interests, direct and indirect, would be heard." (Record of Conference pp. 237-238.)

The basis upon which the rates put in as the result of the Atlanta conference were fully considered by the highest officials of the roads at a representative meeting.

Mr. Smith said: "You will understand that the railroad committee, in its last conference with you, committed the railroads of the South to giving to your committee some definite advices not later than today. The very earliest at which the New York conference could be held was last Thursday. I want to say it was the most representative meeting of the higher officials of the several railroads that I have witnessed in ten years. They had to come from New Orleans, Mobile, St. Louis and all over the country; but we had a representative meeting. It was impossible, in two days, for that conference to consider and discuss all of the rates that are going to be affected by the proposed reductions by the revision represented by those figures, which we have already presented to you. These are specific. Those indicate clearly to you just what rates the
51 managing officers of the several railroads authorized us to submit to you. Those rates simply establish a principle. They simply represent a basis upon which the traffic people now have got to revise. I don't know just what the effect is to be. It is going to take a great deal of work." (Record of Conference pp. 259-260.)

How this rate was arrived at by the carriers in New York was shown by the report of Mr. Smith, who said: "The next thing was to come to a compromise, and to come to you with the best proposition for Atlanta that we could get. I don't like to name lines or name roads, but when the Frisco, with its 251 miles to Birmingham, established those rates with relation to the rates to Atlanta and other territory, they meant to maintain that relation, and they have made a concession to this committee in New York last week. They have said: You may go ahead and reduce your rates to Atlanta to this extent and we will co-operate; we will offer no opposition; but if we go beyond that it is wholly out of the power of the balance of these railroads to prevent them from further reducing Birmingham. That is the situation exactly." (Record of Conference p. 226.)

It is estimated at this conference that the amount of flour, hay, grain and mill feed coming to Atlanta was about 12,000 cars of 20 tons each per annum. (Record of Conference p. 106). Mr. Winburn, of the Central Railroad, said: "The Central of Georgia Railway does not compete for any important share of the business from the West to Atlanta." (Record of Conference p. 119).

W. E. NEWILL.

Sworn to and subscribed before me this 28th day of July, 1908.

[SEAL.] L. D. WATSON,
Notary Public, Fulton County, Ga.

[Indorsement:] No. 590. In the Circuit Court of the United States, Western Division, So. District of Georgia. Macon Grocery Company, *et al.*, *vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of W. E. Newill. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

52 *Affidavit of R. T. Moore.*

In the Circuit Court of the United States for the Southern District of Georgia.

MACON GROCERY CO. ET AL.
vs.
ATLANTIC COAST LINE RAILROAD CO. ET AL.

Bill. In Equity.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned authority, H. T. Moore, who on oath says that he is traffic manager of the Atlanta Freight Bureau in Atlanta, Fulton County, Georgia; that he has examined Southern Classification Number 35, I. C. C. Number 10, effective May 1st, 1908; that the attached two sheets correctly state the articles that are included in the classes named the first sheet stating the articles that are included in Class D, also articles that are included in Class F, that the second sheet states the articles that are included in Class B, also articles that are included in Class C; that the several named commodities are included in the respective classes stated on said attached sheets, each of which is identified by affiant signing his name at the bottom thereof.

H. T. MOORE.

Sworn to and subscribed before me this the 27th day of July, 1908.
[SEAL.] FRAMPTON E. ELLIS,
Notary Public, Fulton County, Ga.

Southern Classification No. 35.

I. C. C. No. 10. Effective May 1, 1908.

The following articles enumerated under Class "D".
Beet pulp, dried, in barrels or sacks.
Bran, shorts and shipstuffs.
Cake, linseed.
Cerealine, in sacks or in bulk, for brewing purposes shipped direct to brewers, carload.
53 Corn, Kaffir, in sacks or barrels.
Corn, Kaffir, in bulk, carload.

Corn cobs, packed, less carload.
Corn cobs, packed or in bulk, carload.
Cotton stalks, carload.
Excelsior, pressed in bales, carload.
Fibre, cocoanut, pressed in bales, carload.
Fibre, palmetto, in boxes or pressed in bales, carload.
Food, animal and poultry feed, N. O. S. —, (bulk), in sacks.
Grain, brewers, dried (refuse malt).
Grain, packed, except in boxes.
Grain, in sacks.
Grain, corn, oats, rye, wheat, in bulk, carload.
Grain, not otherwise specified, in bulk, carload.
Hay, fodder and straw, pressed in bales, carload.
Husks or shucks, carload.
Malt.
Malt Sprouts, or skimmings, in barrels or sacks.
Meal, Alfalfa, in sacks or barrels.
Meal, corn, in barrels, estimated wt. 200 lbs. to bbl.
Meal, corn, not otherwise specified.
Meal, linseed oil meal.
Meal, peanut.
Middling.
Oatmeal, refuse for stock food.
Palmetto or palm leaves, in bundles, boxes or pressed in bales C. L.
Peas, cow, clay or field.
Peanut cribble, flour, grits, bran and hulls.
Rice, crystal or prepared, carload, in sacks or bulk, (used for brewing purposes).
Rice, rough.
Rice bran, chaff and middlings.
Rice polish.
Sea grass, sea weed, or salt hay, pressed in bales, carload.
54 Seed, cotton, carload, min. wt. 30,000 lbs.
Shavings, wood, not otherwise specified, pressed in bales, carload.
The following articles enumerated under Class "F":
Flour, in barrels and half barrels.
Grits, N. O. S., in barrels.

H. T. MOORE.

Southern Classification No. 35.

I. C. C., No. 10— Effective May 1st, 1908.

The following articles enumerated under Class "B":
Meat, salt, in bulk, carload, min. wt. 24,000 lbs.
Cured packing house products, (hams, shoulders, sides, beef, pork, lard, pigs feet, tripe, canned meats, smoked or canned sausage, sausage casings, grease, glue sizing, glue scrap, tallow, etc.)
Bacon and ham, viz:
In bulk, carload, min. wt. 24,000 lbs.
In sacks.
In wood.

Beef, viz:
Canned in boxes, carload.
Salted, in barrels, half barrels and quarter barrels.
Smoked, including beef hams, in boxes or barrels.
Pig's feet, pickles, in wood.
Pork, canned, in boxes, carload.
Pork, salted, in barrels, half barrels and quarter barrels.
Sausage:
Pickled in wood.
Smoked or canned, carload.
Tripe, including canned tripe, in boxes, carload.
Fish, fresh, packed, carload.
Pickled, in barrels, half barrels, kegs, kits or tubs, C. L.
55 Lard Substitutes or Compound:
Solids, in tin cans or stoneware, packed or in wood.
Oils, cooking, (products or cottonseed oil or cocoanut oil), viz:
In tin cans, packed, or in iron or steel barrels, or drums, or in wood.
The following articles enumerated under Class "C":
Flour, not otherwise specified, in sacks, actual weight.

H. T. MOORE.

[Indorsements:] No. 590. In the Circuit Court of the United States, Western Division, So. District of Ga. Macon Grocery Company *et al., vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of H. T. Moore. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Affidavit of H. T. Moore.

In the Circuit Court of the United States for the Southern District of Georgia.

MACON GROCERY CO. ET AL.
vs.
ATLANTIC COAST LINE RAILROAD CO. ET AL.

Bill. In Equity.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned authority, H. T. Moore, who on oath, says that he is traffic manager of the Atlanta Freight Bureau, and that part of his business is to familiarize himself with freight rate traffics; that he has examined the tariff of rates on the classes named in the statement below from and to the points named, in effect on and prior to January 1st, 1905, the tariff that went into effect February 1st, 1905, and the advance rate proposed to go into effect August 1st, 1908; that said statement shows the place from which the tariff is given and the place to which given; figure one shows the tariff effective on and before January 1st, 1905;

and figure two shows the tariff made effective February 1st, 1905; and figure three shows the tariff proposed to become effective August 1st, 1908, and the rate is given for Classes B, C, D, and F.,
56 and for flour in sacks and fresh meats. Affiant says that the appended statement correctly shows the rates taken from tariffs effective as aforesaid.

Statement of rates on Classes B, C, D and F, flour in sacks, and fresh meats from Ohio River crossings; that is Louisville, Cincinnati, Evansville, Cairo, etc., to named destinations in southeastern territory, effective January 1st, 1905, and prior thereto, February 1st, 1905, to this date and to become effective August 1st, 1908.

From—	To—		B.	C.	D.	F.	Flour in sacks.	Fresh meat C. L.
Cincinnati,	Albany, Ga....	1	41	32	28	56	28	51
Evansville,	Cordele, Ga....	2	39	31	27	54	27	49
Louisville,	Dublin, Ga.....	3	42	33	29	58	29	52
Do.	Macon Ga.....	1	37	30	26	52	26	47
		2	35	28	24	48	24	45
		3	38	30	26	52	26	48
Do.	Valdosta, Ga....	1	44	34	30	60	30	54
		2	42	33	29	58	20	52
		3	45	35	31	62	31	55
Do.	Atlanta, Ga.....	1	35	28	24	48	24	45
		2	33	26	22	44	22	43
		3	36	28	24	48	24	46
Do.	Athens, Ga.....	1	37	30	26	52	26	47
		2	35	28	24	48	24	45
		3	38	30	26	52	26	48
Cincinnati,	Columbus, Ga..	1	39	32	28	56	28	49
		2	37	30	26	52	26	47
		3	40	32	28	56	28	50
Evansville, Louisville,	Columbus, Ga...	1	37	30	26	52	26	47
		2	35	28	24	48	44	45
		3	38	30	26	52	26	48
Cincinnati,	Rome, Ga.....	1	33	26	22	44	22	43
		2	33	26	22	44	22	43
		3	36	28	24	48	24	46

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	Evansville	2	33	26	22	44	22	43
Louisville	.....	3	36	28	24	48	24	46

H. T. MOORE.

Sworn to and subscribed before me this 27th day of July, 1908.
[SEAL.] FRAMPTON E. ELLIS,
Notary Public, Fulton County, Ga.

[Indorsements:] No. 590. U. S. Circuit Court, Western Division, Southern District of Georgia. Macon Grocery Company, *et al.*, *vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of H. T. Moore. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Affidavit of Thomas J. Freer.

In the Circuit Court of the United States for the Southern District of Georgia.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Bill. In Equity.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned authority, Thomas J. Freer, who, first being duly sworn, on oath says:

That, on the 22nd day of July, 1908, he, as a stenographer, stenographically took down the proceedings of a conference of railroad officials and representatives of certain commercial bodies, held before the Railroad Commission of the State of Georgia on said date; and that, in the course of said proceedings certain questions were asked J. M. Culp, of the Southern Railway Company, by Railroad Commissioner Callaway, and that said questions were answered by said J. M. Culp and the questions and answers taken down by affiant; that, among such questions and answers affiant took down the following, to-wit:

"Commissioner CALLAWAY: Your net income for March, this year, was what, compared to 1907?

58 "Mr. CULP: You refer to the net system earnings?

"Commissioner CALLAWAY: Net earnings of the system.

"Mr. CULP: The net earnings for the month of March this year were $1,067,000.

"Commissioner CALLAWAY: I mean as compared with 1907.

"Mr. CULP: $1,067,000, as against $813,000 and odd.

"Commissioner CALLAWAY: That is an increase of about how much?

"Mr. CULP: Two hundred and odd thousand dollars.

"Commissioner CALLAWAY: In April, how was the net earnings?

"Mr. CULP: One million and fifty-seven odd thousand dollars.

"Commissioner CALLAWAY: Against what?

"Mr. CULP: Against seven hundred and eighteen thousand and odd, an increase of $339,000.

"Commissioner CALLAWAY: In March it was $255,000, and in April $339,000?

"Mr. CULP: Yes, sir.

"Commissioner CALLAWAY: In May?

"Mr. CULP: Ninety thousand increase.

"Commissioner CALLAWAY: Have you made up June yet?

"Mr. CULP: No, sir.

"Commissioner CALLAWAY: It seems that for March, April and May the net income was larger than in 1907, which was the big year.

"Mr. CULP: Yes, sir; accomplished, as I say, by this drastic reduction of expenses, which must be temporary, in the order of things. Mr. Thomson calls my attention to the fact here that *while* the year ended June 30th, 1907, was the greatest gross year.

"Commissioner CALLAWAY: It was not the greatest net?

"Mr. CULP: No, sir; it was less than 1906.

"Mr. THOMPSON: Nearly two million dollars.

"Commissioner CALLAWAY: You mean there was a big business, but not so much net profit?

"Mr. THOMPSON: So the comparison with March, April and May of this year gives greater opportunity for better net results?

"Commissioner CALLAWAY: That is right.

"Mr. THOMPSON: Than in 1907. While the figures given by Mr. Culp show an increase in the net on the system as a whole, in March showed $220,000, there was a decrease in that same month in the net earnings in Georgia of $1446.00.

59 "Commissioner CALLAWAY: 1907 was your best gross year, but 1906 was your best net year?

"Mr. THOMPSON: Yes, sir.

"Mr. CULP: Take the business of Georgia, all of it, interstate, intra-state, business that has origin or destination in Georgia, and that passing through Georgia, all of it, we show for the State here, in the month of July, 1907, a *decree* [decrease] of $89,500, in round figures.

"Commissioner CALLAWAY: That is gross?

"Mr. CULP: That is net. We show in August a decrease of ninety thousand three hundred and odd; we show in September a decrease of fifty-one thousand five hundred and odd; we show in October a decrease of ninety-two thousand and odd, in round numbers; we show in November a decrease of sixty-eight thousand dollars; in December eighty-two thousand five hundred; in January we show a decrease of seventy-six thousand dollars; in February we showed a decrease of fifty-five thousand dollars, in round numbers; in March we show a decrease of $1146; we show in April an increase of $24,000."

Affiant further says that such questions and answers were correctly taken down, and that the above and foregoing is a correct statement thereof, and represents correctly what was asked and answered by the parties to the colloquy.

THOS. J. FREER.

Subscribed and sworn to before me this 28th day of July, 1908.

[SEAL.] ROBT. F. DE BELLE,
Notary Public, Fulton County, Georgia.

[Indorsements:] In Equity. In the Circuit Court of the United States for the Southern District of Georgia. Macon Grocery Company, *et al.*, *vs.* Atlantic Coast Line Railroad Company, *et al.* Affidavit of Thos. J. Freer. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

60 *Affidavit of H. J. Baker.*

In the Circuit Court of the United States for the Southern District of Georgia.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Bill. In Equity.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned authority, H. J. Baker, who, first being duly sworn, on oath says that he has examined the files of the Atlanta Journal, a daily newspaper published in the City of Atlanta, Fulton County, Georgia, with reference to the financial news thereof, and for the purpose of ascertaining the quotations on certain railroad stocks published in said Atlanta Journal; and affiant has examined such quotations to see the opening prices of the stocks hereinafter mentioned on the 15th day of each month, beginning with July 15th, 1907, and ending July 15th, 1908.

Affiant says that the following table correctly shows the quotations taken from said Atlanta Journal for the dates named, to-wit:

1907.

	July 15.	Aug. 15.	Sept. 15.	Oct. 15.	Nov. 15.	Dec. 15.
A. C. L.						
Common	None	None	None	None	None	None
Preferred	98	77¼	82 (close)	70¼	64¼	65½
L. & N.						
Common	None	None	None	None	None	None
Preferred	117	104	108	100¼	93½	90
Sou. Rwy.						
Common	20½	16½	15½ (close)	11⅝	12	12⅞
Preferred	None	56	55⅞	46	37½	39¾

1908.

	Jan. 15	Feb. 15.	Mar. 15.	Apr. 15.	May 15	June 15.	July 15.
A. C. L.							
Common	None	None	None	None	None	None	None
Preferred	72½	63	65	73	90	90	92
L. & N.							
Common	None	None	None	None	None	None	None
Preferred	100⅞	89¾	96½	99	109½	107¼	108⅞
Sou. Rwy.							
Common	10⅛	9⅞	11	13¾	17⅞	17⅜	17⅞
Preferred	35	31½	29⅛	39¼	44⅞	45½	45½

PAGE BOUND VERTICAL IN BOOK

62 That "A. C. L.," as used in the above statement, means the Atlantic Coast Line Railroad Company, that "L. N." means the Louisville & Nashville Railroad Company; that "Sou. Rwy." means the Southern Railway Company; that "Common" means common stock and "Preferred," means preferred stock.

H. J. BAKER.

Subscribed and sworn to before me this 28th day of July, 1908.

JACOB J. SAUL,
Notary Public, Fulton Co.

[Indorsed:] No. 590. In Equity. In the Circuit Court of the United States for the Southern District of Georgia. Macon Grocery Company, *et al., vs.* Atlantic Coast Line Railroad Company, *et al.* Affidavit of H. J. Baker. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Affidavit of R. C. Corbin.

In the United States Circuit Court for the Western Division of the Southern District of Georgia.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE R. R. CO. ET AL.

In Equity. Bill, etc.

UNITED STATES OF AMERICA,
Southern District of Georgia, County of Bibb:

Personally appeared before the undersigned, an officer duly authorized to administer oaths, R. C. Corbin, who, being first sworn, deposes and says: That he is manager of the Macon Grocery Co., one of the complainants named in the above entitled cause; that the said Macon Grocery Co., is engaged in the wholesale business in the City of Macon, Georgia, and is a dealer in hay, grain, flour, meats and other articles, upon which the increased freight rates mentioned in the declaration filed by the carrier companies, respondents in the above entitled bill, effective August 1st, 1908, are made to apply by said declaration and which increase in freight rates the bill in this cause seeks to enjoin.

63 That deponent has made a careful estimate as to the annual increase in freight rates upon the articles aforesaid, handled by the said Macon Grocery Co., in its business, as aforesaid, which said estimates — based upon the volume of business of the said Macon Grocery Co., for the previous year, and that in the opinion of deponent, said increase in the amount of freight rates which will be paid by the said Macon Grocery Co. will amount to 6000.00 dollars per annum; and that in the opinion of deponent said increase in freight rates upon the articles aforesaid, which will be paid by the

merchants in the City of Macon, Georgia, will amount to 35000.00 dollars per annum, and in the State of Georgia will amount to 500,000.00 dollars per annum.

That following a conference between shippers and representatives of the railway lines in Atlanta, Georgia, during the year 1905, there were reductions in freight rates from the West to Macon and other points in Georgia upon the above named commodities; and that under said reduction a large traffic has moved and conditions have now become adjusted in trade, and that in the opinion of deponent to change said rates, at the present time, would disturb trade conditions, existing contracts being based upon the said freight rates and cause a serious loss to fall upon both the consumer and the dealer in the aforesaid commodities.

That the margin of profit to the dealer upon the aforesaid commodities is very small, and that while it would be possible for the dealer by increasing the price of the aforesaid commodities to absorb a part of said increase in freight rates, and pass the same along to the consumer it would be impossible at least until conditions adjusted themselves, to absorb the entire increase in said freight rates, and that by such increase a large loss would fall both upon *both* the dealer and the consumer.

That the largest part of the supply to the State of Georgia in the aforesaid commodities comes from points beyond the Mississippi and Ohio Rivers, and is affected by the said increase in freight rates, there being no other available source of supply.

That while it is true, that following the financial panic in the fall of 1907, there was a general depression in all lines of business trade in the articles and commodities upon which it is proposed by the carriers to increase freight rates, it — improving and rapidly assuming normal conditions, and that in the opinion of deponent, with
64 the opening of fall trade, a vast amount or tonnage in the aforesaid commodities will move from the West to the State of Georgia.

R. C. CORBIN.

Sworn to and subscribed before me this 28th day of July, 1908.

S. E. BAYNE,
Not. Public, Bibb Co., Ga.

[Indorsed:] No. 570. In the Circuit Court of the United States for the So. District of Ga., Western Division. Macon Grocery Co., *et al. vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of R. C. Corbin. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Affidavit of S. M. Solomon.

In the United States Circuit Court for the Western Division of the Southern District of Georgia.

MACON GROCERY CO. ET AL.
vs.
ATLANTIC COAST LINE R. R. CO. ET AL.

In Equity. Bill, etc.

UNITED STATES OF AMERICA,
Southern District of Georgia, County of Bibb:

Personally appeared before the undersigned, an officer duly authorized by law to administer oaths, S. M. Solomon, who being first duly sworn deposes and says: that he is engaged in the business of a stock and bond broker in the City of Macon, and that the Commercial and Financial Chronicle, published by William B. Dana Co., of New York, is a recognized trade journal in the aforesaid business, and is accepted by stock and bond brokers, and the public generally, as authority upon the quotations and market price of the stocks and bonds of the principal railway companies in the United States, and as authority upon the earnings of said railway companies.

This affidavit is made to be used as evidence upon the hearing for interlocutory injunction in the above entitled cause.

S. M. SOLOMON.

65 Sworn to and subscribed before me, this 28th day of July, 1908.

L. A. THARP,
Notary Public, Bibb Co., Ga.

[Indorsed:] No. 590. In the Circuit Court of the United States, Western Division, Southern District of Georgia. Macon Grocery Co., *et al.*, *vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of S. M. Solomon. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

Affidavit of N. T. Moore.

In the Circuit Court of the United States for the Southern District of Georgia.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD CO. ET AL.

Bill. In Equity.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned authority, H. T. Moore, who on oath says that he is familiar with Poor's Manual of

Railroads and has used the same, and that the same is a book published annually, given [giving] the statistics with reference to railroads, their stock holdings, mileage, etc.; that affiant has found in his use of said Manual that the statements therein given were accurate and reliable. Affiant has especially examined the Manual for 1907, being the 40th annual number, and finds statements therein with reference to the hereinafter named railroad companies as follows:

Atlantic Coast Line Company.

The Atlantic Coast Line Company was organized May 29th, 1889, under the laws of Connecticut. It owns or controls the Atlantic Coast Line system of railroads, extending from Richmond and Norfolk, Virginia, to Atlanta, Georgia, Montgomery, Alabama, and Puntagorda, Florida, reaching Wilmington, North Carolina, Charleston, Port Royal and Columbia, South Carolina, Augusta, Macon, Savannah and Brunswick, Georgia, Jacksonville, Port Tampa,
66 Fort Myer, Florida, and numerous other points in the South Atlantic States. The company is interested in the Atlantic Coast Line Railroad Company 4,333.63 miles; the Louisville & Nashville Railroad (including Y. R. R. R. and C. & N. Ry.) 4,299.93 miles; Louisville, Henderson and Nashville Railway 181.70 miles; Nashville, Chattanooga and St. Louis Railway 1,266.08 miles. The Atlantic Coast Line Company is also interested in other railroads making total mileage in which it is interested 11,667.21 miles.

See Poor's Manual 1907, page 347.

Atlantic Coast Line Railroad Company.

The Atlantic Coast Line Railroad Company is a Virginia corporation, a majority of its stock being owned by the Atlantic Coast Line Company. It owns and operates in Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama 4,193.32 miles. It has leased lines and trackage right from other lines, including the Seaboard Air Line Railway, to the extent of 22.01 miles. The Atlantic Coast Line Railroad Company is the owner of a majority of the capital stock of the Louisville & Nashville Railroad Company. The railway of the Atlantic Coast Line joins those of the Louisville & Nashville Railroad Company at Chattanooga Junction, Florida and Montgomery, Alabama. The Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company are joint lessees of the Georgia Railroad Company.

See page 350 Poor's Manual for 1907.

Louisville & Nashville Railroad Company.

The Louisville & Nashville Railroad Company owns lines in Illinois, Indiana, Kentucky, Tennessee, Alabama, Florida, Mississippi and Louisiana. It either owns a majority of the capital stock or is interested as joint owner or lessee in the Nashville, Chattanooga & St. Louis Railway; Georgia Railroad Company and dependencies, and other railroads. Its total mileage owned, leased or operated

is 6,841.82 miles. It has trackage rights at numbers of places, including Cartersville, Georgia, over the Western Atlantic Railroad from Junta to Atlanta, Georgia.

See Poor's Manual for 1907, pages 463 and 464.

Nashville, Chattanooga & St. Louis Railway.

This company owns 835.06 miles of road, and operates
67 1,226.08 miles. It is a lessee of the Western & Atlantic Railroad from Atlanta to Chattanooga, Tennessee.

Poor's Manual for 1907, pages 474-75-76.

Southern Railway Company.

The Southern Railway Company owns 4,521.32 miles of railroad in Virginia, North Carolina, South Carolina, Georgia, Tennessee, Alabama, Mississippi, Kentucky, Indiana, and Illinois. The total amount of mileage owned and operated by the Southern Railway Company is 7,515.85 miles. It controls by ownership of securities the Georgia Midland from McDonough to Columbus, Georgia, 97.88 miles. It owns terminals and trackage rights in Atlanta, Savannah, and Augusta, Georgia. It has trackage rights over the Louisville & Nashville Railroad Company in Birmingham, Florence and Mobile, Alabama, and in Middlesboro, Kentucky, and Hyde, Tennessee, and over the Atlantic Coast Line at Brunswick, Savannah and Jacksonville, over Nashville, Chattanooga & St. Louis Railway from Chattanooga, Tennessee, to Stevenson, Alabama. The Southern Railway Company controls the Mobile & Ohio Railroad Company, the Georgia Southern & Florida Railway Company, the Augusta Southern Railway Company. It owns a one-half interest in a majority of the stock of the Cincinnati, New Orleans & Texas Pacific Railway Company, and owns an interest in various other companies.

Poor's Manual 1907, pages 400 to 404, inclusive.

Cincinnati, New Orleans & Texas Pacific Railway Company.

This company owns a road from Cincinnati to Chattanooga, Tennessee, 335.92 miles.

Poor's Manual for 1907, pages 456 and 57.

H. T. MOORE.

Sworn to and subscribed before me, this 27th day of July, 1908.

[SEAL.] FRAMPTON E. ELLIS,
Notary Public, Fulton County, Ga.

[Indorsed:] No. 590. In the Circuit Court of the United States for the Western Division, So. Dist. of Georgia. Macon Grocery Company, *et al., vs.* Atlantic Coast Line R. R. Co., *et al.* Affidavit of H. T. Moore. Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

68 Proceedings of a Conference of Railroad Officials and Representatives of Certain Commercial Bodies with the Railroad Commission of Georgia in Regard to a Proposed Increase in Freight Rates from the West to the Southeast on Classes B, C, D and F, at the Office of the Railroad Commission of Georgia, Atlanta, Georgia, July 22, 1908.

10:30 O'CLOCK A. M., *July 22d*, 1908.

Present:
Hon. S. G. McLendon, Chairman.
Hon. George Hillyer, Commissioner.
Hon. Fuller E. Callaway, Commissioner.
Hon. O. B. Stevens, Commissioner.

Chairman MCLENDON:

GENTLEMEN: I presume all those present understand the purpose for which this meeting has been arranged. It is for the purpose of conferring together and discussing a proposed advance in freight rates from the West to certain Georgia points, or to the Southeast, on Classes B, C, D and F. This is a postponed meeting. The meeting, as originally announced, was held on the 16th of this month. On the 16th Mr. Smith, of the Louisville & Nashville Railroad, telegraphed, suggesting that it be postponed until the 21st, and on motion of Judge Hillyer it was postponed until the 23d. Now, the commission, is, in pursuant of that action on the 16th, ready to hear from anybody who may have any evidence, or any facts, to submit on this subject, one way or the other. The law charges us with the duty of thoroughly investigating it. I don't know how to do that, except to ask questions and get information, and the commission is here, ready to receive information. There is no prearranged order about it. Anybody who wishes to be heard, can be heard. I will state there are—how many communications on the file, Judge?

Judge HILLYER: Two or three.

69 Chairman MCLENDON: There is a communication from Americus, saying that Americus would be represented; I don't know whether Americus is here, or not. There is a letter from Albany. There is a letter from Commerce, and there is a letter from Augusta. As far as I know, that is all, isn't it?

Judge HILLYER: I don't recall any other. The Albany letter don't seem to be in the file.

Chairman MCLENDON: I think that is in my desk, mixed up with some papers of mine.

Judge HILLYER: It is proper to say, perhaps, that this hearing was first ordered to take place on the 16th. Colonel Scott was in Atlanta, and he informed us that there was a meeting of railroad men, already and previously appointed at Louisville for that same date, and that the two dates would conflict, and that some of them wanted to be here, who were also under appointment and obligation to be in Louisville, so, at his instance, the hearing was moved up to the 14th, but with the tacit understanding that that would be for

the hearing merely, and that the matter could hardly then be finally determined, but to give an opportunity for such to be heard as desired. I confess I got the impression in some way, I hardly know how, but I got the impression, that one feature of the conference in Louisville would be to determine whether, after all, it would not be better to drop the proposed increase on grain and meat products. It turned out differently, however. Well, in compliance with that suggestion, a majority of the commission changed the date, and appointed the 14th. On the 14th a number of gentlemen came here, chiefly railroad men; and then it developed that, in the proposed conference at Louisville, which was to take place on the 16th, there was to be considered a widening and extending of the increase, so as to make it almost or quite universal on all classes of freight. That was the first intimation, so far as I can recall, for my own part, that I heard of that, and I only know through the public press the general fact that, in the conference at Louisville, some action was had, extending the proposed increase into other
70 and a wider extent of classes or articles of freight. Precisely what that was, however, we don't know, as yet.

On the 14th the hearing was adjourned over to the 16th, and some further discussion on the subject occurred then, and finally, the matter was set down for further hearing for today, but without the commission having taken any final order, or committed itself, or acted on it in any way; and as I understand it, the chairman correctly states that the matter is now open for discussion by anyone interested in the subject.

Chairman McLENDON: The suggestion I would make would be, before we proceed further, let's ascertain who is present, or what cities are represented. Is anybody present from Augusta? Is anybody present from Americus? Is anybody present from Albany? Is anyone here representing Commerce? I call those places, because they are towns whose commercial bodies have communicated with the commission. Now, is there any other city represented?

Mr. HARDY: Rome.

Chairman McLENDON: Who is present from Rome?

Mr. HARDY: Mr. Frank Berwind and Mr. Wilson Hardy, as a committee from the Manufacturers' & Commercial Association.

Chairman McLENDON: Are committees from any other cities present? If anyone is here representing any commercial body, or municipal body, we would be glad to have that fact disclosed. No one seems to answer for any city except Rome. Now, gentlemen, what railroads will wish to be heard?

Mr. THOS. K. SCOTT: The Georgia Railroad.

Chairman McLENDON: The Georgia Railroad wishes to be heard.

Mr. J. S. B. THOMPSON: The Southern Railway.

71 Mr. R. A. BRAND: The Atlantic Coast Line.

Mr. H. F. SMITH: The Nashville & Chattanooga is represented.

Mr. C. T. AIREY: The Central of Georgia Railway is represented by Mr. Winburn and Mr. Airey.

Mr. J. J. SPALDING: I don't know whether you will care to hear from a dead man or not, but the Seaboard is here.

Chairman MCLENDON: The Seaboard Air Line Railway is represnted by Col. Jack Spalding and Mr. Pride. Is there any other person, or community, or trades body or railroad present?

Mr. C. A. WICKERSHAM: The Atlanta & West Point Railroad is present.

Chairman MCLENDON: What is the pleasure of the commissiot as to whether the shippers shall be heard from first, or whether th railroads shall be heard from first?

Commissioner CALLOWAY: The railroads want to show the reasons why they want to advance the rates.

Chairman MCLENDON: It seems to me that would be the orderly way.

Mr. S. F. PARROTT: I represent a very small interest, which is in the same class as Mr. Spalding.

Chairman MCLENDON: What is that?

Mr. PARROTT: The Macon & Birmingham Railway.

Chairman MCLENDON: The Macon & Birmingham Rail-
72 way is represented by Mr. Parrott. It is the desire of the commission that the railroads shall present the reasons which induce them to believe that this proposed rate will be a just and reasonable and proper advance in the rates. You may agree among yourselves, as to which road shall be heard first, so far as the commission is concerned.

Mr. SCOTT: I believe the other railroad gentlemen have asked me to talk first. I will be very brief. As I have already shown you, for the last fiscal year, ended June 20th, 1908, according to the most accurate return we have been able to get so far, the deficit between our earnings and our operating expenses, including rental and taxes, was $285,000. I don't know that I can add anything to that. There is the fact. It stands for itself. That deficit was caused by our inability to make any increase of our earnings, or any material decrease in expenses. We were halted on both sides of that proposition; we could not increase our earnings, and we could not overcome the increase in our operating expenses, and that result was brought about by those causes and we are in that condition to-day.

Commissioner CALLOWAY: Was that the gross earnings, or the net?

Mr. SCOTT: The gross earnings.

Commissioner CALLOWAY: Was $285,000 deficit?

Mr. SCOTT: No; the gross earnings failed to yield enough net earnings to pay all operating expenses, rental and taxes, by the sum of $285,000.

Commissioner CALLOWAY: You say how much of that was taxed on the back taxes?

Mr. SCOTT: None.

Commissioner CALLOWAY: That is outside of that?

73 Mr. SCOTT: I am not presenting our profit and loss account; that will come later, and our back taxes will go into

the profit and loss account. It is not feasible to go back over a period of many years, and apportion the back taxes to the earnings and operations of those years, and it will appear in the profit and loss statement for the year just ended.

Commissioner CALLOWAY: Do you remember, on June 30th, 1907, was there a deficit for that year?

Mr. SCOTT: Yes, sir.

Commissioner CALLOWAY: How much?

Mr. SCOTT: $127,000.

Commissioner CALLOWAY: And in 1906?

Mr. SCOTT: In 1906, there was a profit, but I do not for the moment remember what that was.

Commissioner CALLOWAY: 1907 was about the biggest gross tonnage year, wasn't it?

Mr. SCOTT: The largest gross earning year and gross tonnage year on record. If you desire to ask me questions, I will endeavor to answer them, but in order to give way to gentlemen who have more important statements to make, I will close now.

Chairman MCLENDON: Mr. Scott has concluded his remarks. Who else wishes to be heard?

Judge HILLYER: Mr. Scott, let me ask you this: I remember about that Social Circle buggy case some years ago; it seems to me the question over the east and west lines, by way of the northern ports, such as Baltimore, for instance, by sea, and up to Augusta, en-
74 tered into the question; now, is this rate, this change in rates south of the Ohio and east of the Mississippi Rivers, complicated in any way, as to your road, by the rate, or on account of the rate, by sea—I mean now on western products?

Mr. SCOTT: No.

Judge HILLYER: That question isn't in this?

Mr. SCOTT: I don't know that I understand your question.

Judge HILLYER: It seems to me, in the Social Circle case, the investigation was complicated, I don't precisely remember to what extent, by the notion that the local traffic on the Georgia Road could be influenced by bringing the freight, say by the B. & O., to Baltimore, or over the Pennsylvania lines to Philadelphia or New York, and then by sea to Charleston or Savannah, and up to Social Circle. Mr. Peck's testimony went into that. I merely wished to know whether that has anything to do with this question.

Mr. SCOTT: Let me explain the Social Circle case briefly. It was with relation to the rate on buggies, and the Georgia Railroad attempted to show that it was authorized to make a lower rate on buggies from Cincinnati, Ohio, to Augusta, Georgia, than it made to Social Circle, Georgia, on account of the ocean and river competition, but in the proof submitted, it failed to establish the fact that buggies moved by that route, and the Interstate Commerce Commission finally, on review, threw out that part of the argument altogether, and decided the Social Circle case on the long and short haul clause, not complicated by any conditions prevailing at Augusta that did not prevail at Social Circle. In other words, we failed to show that that

competition was real, although it was real as to very many things, but not as to buggies. That was the relation.

Judge HILLYER: So, as I understand it, you don't regard the complication by sea as involved in this present question?

75 Mr. SCOTT: No.

Chairman MCLENDON: Does anybody else wish to be heard?

Mr. J. M. CULP: Just a few days ago, I was before the Commission, and at that time, endeavored to show the necessity for the proposed advance in rates on B, C, D and F, and any other advances that might be made. I did not have any figures before me, and I perhaps haven't got all the figures that more time would have enabled me to prepare. I only got this notice on my return home, a couple of days ago, two or three days ago, and I haven't had time to get all the figures I ought to have, and would like to have.

The Commission has been furnished from time to time with figures by our president, which show the falling off in earnings for some months; since last September, the earnings in Georgia have fallen off; since last November, the earnings of the system have fallen off right along. The earnings commenced to fall off before the panic; they had already commenced to decrease, as compared with what they had been, and they have showed right along a falling off. As reflected in our earnings, and leaving out the peach movement this year, which we didn't have to any important extent last year, our earnings do not reflect, or rather, do not indicate, any early increase in earnings. Mr. Finley, the president, and myself have had conferences about the prospect, and from the information that we can get, as well as we are able to forecast, we think the month of August will show as great a falling off, or as great a relative falling off, as in May; and in May, our earnings decreased over one million dollars. In the month of June, the latter part of June, and in the first week in July, we, by reason of the peach movement, show a less falling off, but in the second week in June, the falling off is greater, relatively, than in the first week, and for the third and fourth weeks in June, and July, I should have said, the third week we haven't got, but I would like to read you some figures: In January, 1908, our earnings were less than in January, 1907, by $640,345, and odd cents.

Commissioner CALLOWAY: Is that net, or gross?

76 Mr. CULP: That is gross. In the month of February, our earnings fell off $695,898 and odd cents, say, in round numbers, $696,000. In March, our earnings fell off $666,889 and odd cents, say, in round numbers, $667,000. In April, they fell off $793,893 and *off* [odd] cents, say in round numbers, $794,000. In May they fell off $1,171,774 and odd cents. In those five months there was a reduction, in round numbers, of four million dollars.

Commissioner HILLYER: That is gross income?

Mr. CULP: That is gross.

Chairman MCLENDON: Those figures you have furnished every week to this office.

Mr. CULP: I think so; I think every one has come to this office

from the president, through Mr. Thompson. Now, in the month of June our earnings fell off $879,724, or, in round numbers, $880,000. Now, our peach movement, the estimated revenue was $138,500 more than in 1907, and but for that increase there, which is abnormal, which will have ceased certainly by the end of this month, or before the end of the month, which we have no certainty for any year, it may come some years, and some years it doesn't, and if, therefore, we add that $138,500 to this deficit in June, we would have fallen off $1,018,200 and some odd dollars, $1,018,000, which is almost as much as we fell off in May; May being $1,171,000. Now, in July, the first week in July——

Chairman McLENDON: You fell off $146,746.

Mr. CULP: That is for the State of Georgia, I presume.

Chairman McLENDON: No; this is all lines; this is your report to the Commission, one of your reports that comes in here every week.

Mr. CULP: In the month of July, we fell off——

77 Chairman McLENDON: Week ended July 14th.

Mr. CULP: I have that here.

Chairman McLENDON: These are estimated figures, however.

Mr. CULP: I have here the earnings, $139,000.

Chairman McLENDON: You are dealing with Georgia alone.

Mr. CULP: No, I am not; I am dealing with the system. $139,000; that perhaps was an estimate I had.

Commissioner CALLOWAY: That is for the first week?

Mr. CULP: No, sir; two weeks.

Chairman McLENDON: Your two weeks, reported here, as a part of your general scheme of reporting to this office, which has been going on for this entire year.

Mr. CULP: What does that show?

Chairman McLENDON: The figures you are reading are figures with which I am perfectly familiar, because they have come into the office week by week, just as these came in yesterday or the day before. Your total for the two weeks ended July 14th, 1908, was $1,823,428, against $2,056,548 for the corresponding period in 1907. The decrease was $233,120.

Mr. CULP: The second week Mr. Chairman and Commissioners, was $139,000, $138,914; the two weeks are $233,120, so that the first week, you will see, because of the peach movement, was

78 less falling off than the other weeks; but this second week is $138,914, and that includes the peach movement; but for the peach movement that probably might have been as much as $185,000 or $190,000 for that week. Now, taking $175,000 or $180,000, say you have three-quarters of a million dollars a month falling off in the months of July and August, as I say, we forecast that we are going to have as much relative falling off as in the month of May.

Now, those are the facts with respect to gross earnings. It is true that, commencing in March and running through April and May we, with the most drastic retrenchment, stopping work which ought to be done, ought to be done in the interest of the public, as well as ourselves, dropping that temporarily, the net for the

months of March, April and May, was not as bad as it would have been if we had continued to do the work which we ought properly to do. For instance, our shops are not running full, we haven't got full forces, we have dropped a good many men; we are endeavoring, and are keeping up the repairs to the equipment, the engines and cars to do the business that is offered, and we are trying to do a little more than that; but what we ought to do, in our own interest, and in the interest of the public, is to have our equipment in such condition as near one hundred per cent. as possible, so that, when business does revive, we will be able to move it promptly and satisfactorily.

Depots. We have had to, just as far as our duty to the public, and probably with some leniency on the part of the Commission and the public, not do repairs that might properly be done with respect to depots, to say nothing about new depots.

While we are keeping our track in safe condition, perfectly safe condition, there is much work that ought to be done, and is done generally by railroads, in the way of keeping ditches clean, and all that sort of thing, that we have had to suspend temporarily.

Now, as I have said once here before to this Commission, we are going along, trying to do on one or two meals a day for a while, but we can't keep that up forever; we can't keep it up indefinitely; we have got to have money to do it with; we can't do it with the present earnings, or with the earnings, if our prognostication is right, the earnings we will get for some little time to come. We have endeavored to make some advance in the rates, very moderate advances in the rates. In 1905 we reduced the rates from the East and West into this section of the country. Now, as to grain and its products,
79 we have restored that reduction; as to other products, the rates on which have not been completed, and therefore I am not able to say just what they may be, or will be, when finally prepared, but so far as has been gone into, the maximum advance there is seven cents per hundred on first class down to one cent; in some cases there has been little or no advance. The explanation of that is that, in the years that have gone by, dealing with one place, or one section, there have been, in going over the rates in the most careful way, checking the [same] for several weeks most carefully, we have here and there found what might possibly be held to be a discrimination, and we have endeavored to remove anything that might look like an unjust discrimination, whether it was through inadvertence or error of judgment, or otherwise, we have endeavored to correct that thing, and therefore, while, as I say, the maximum advance is seven cents on first class down to one cent, in some cases there are no advances.

After the hearing here a couple of weeks ago, or ten days, I have forgotten the date, on the 14th, it was endeavored to show by the railroad people that there was a great exaggeration in the minds of some of the public, or in some directions, as to the extent of this advance. We have heard it said that it would cost the state millions of dollars. Well, it will cost them a fraction of a million dollars, a small fraction of a million dollars, I think; that is my estimate; I haven't compiled the figures. I think Mr. A. R. Smith, who had compiled figures for

the Louisville & Nashville Railroad, made this statement—I will ask the Chairman and Judge Hillyer, who were present, if my memory is correct—he stated, in a general way, that the Louisville & Nashville Railroad carried over some part of its rails, forty per cent. of the B. C. D. and F. into the southeastern territory, and that he estimated that the advance on B. C. D. and F. to the Louisville & Nashville Railroad would be $78,000. Is that right, Mr. Chairman?

Chairman McLENDON: I think so.

Mr. CULP: That is my recollection. I said that I didn't think the average receipts in the City of Macon, where it was said the increase would be $125,000 per annum, that I didn't think on an average, that would be over ten cars per day. I haven't had time to get the receipts from Macon, at least, I haven't done so, but I have
80 heard nothing since which caused me to think that my estimate was too low at that time. Now, four cents a hundred pounds advance, at 40,000 pounds, would be eight dollars a car; 3500 cars, say, would be about $28,000, $28,000 to $30,000 advance at Macon. An estimate was shown here based upon the reports indicating that the actual cost of the families of an average of five, would be, per annum, forty odd cents, forty-three or forty-seven cents per year—that would be the average. Now, when it is borne in mind that on flour and grain and its products, it is only putting the rates back where they were in 1905, on the 1905 basis, that is surely a moderate advance. The other advances, as I say, will be considered with the greatest care, they have been and are being considered with the greatest care; and I say this without any fear of successful contradiction, that when they are made they will be found not to operate harshly or hardly on any interest, whatever it may be.

It has been suggested that the railroads ought to do just like the public generally do, if hard times are on us, we ought to just take the medicine along. Well, theoretically, that is all right; theoretically, it sounds all right; but I urge this Commission to remember this, to remember that we reduced in 1905, and other things were not reduced then, in 1905, but we reduced; our passenger rates have been reduced, reduced per capita by the constituted authorities, the governmental authorities, and, following that, we reduced the mileage books, at least, some of the lines did, to preserve the difference that had heretofore existed; the reduction of the mileage books was, in the opinion of the railroads, a necessary sequence to the reduction of the per capita, that is, the individual rates which the authorities fixed for us. We have made reductions from time to time, outside of the reductions we made in 1905.

During all this time the railroad wages have advanced, and I don't believe this can be controverted; that the railroad labor, the prices of railroad labor, have advanced more than other classes of labor.

Now, whenever any other enterprise than the railroads—I think that is right, any other enterprise than the railroads—find a business unprofitable, or a part of their business not profitable, or find their business in a given territory not profitable, they can cut it out; they are not compelled to go on and sell and buy; they just wipe out

the unprofitable business and continue to do that which is profitable; and if they find the whole thing losing money they just shut
81 up shop, and say: "We'll wait till times get better." That is done every day, all sorts of enterprises, sawmills, furnaces, factories, all close down, but the railroad can't close down; it has got to go on; it has got to furnish service to the public, and that is one reason why the authorities ought to, when times are like they are now, approve some advance in the rates, to enable them to go along and furnish the service which they are required by law to furnish. Certainly, if we could go ahead and increase our earnings and the increase not fall hard on any one family, or any one consumer, and thereby we could give employment to men as we were employing them in the first part of 1907 and 1905, certainly it would be a thing that would be desirable from every point of view that I can see; it would stimulate business; there would be more money to spend. We could, on the advances in rates established, slight advances in rates permitted, tend to establish our credit; we could get more money to spend on these things, and our earnings would be increased, too, and those could go in.

Now, don't over look this fact: the Southern Railway has been compelled, because of the falling off in its earnings, to suspend its dividend on the preferred stock, and that is not a cumulative dividend, at all; that is, during the time that we are suspending that dividend that is lost to the holders of those securities and we don't know how long that may be. We have, by the strictest economy, practiced since last February, commencing with February—I don't say that our expenses were more than they ought to have been when we commenced to reduce—but just on the idea that we could get along for a while on a meal or two a day, we have reduced expenses

Judge HILLYER: I would be glad if you would be as precise as you can, because I am in the dark about it—the passing of the dividend on that preferred stock you speak of, what is the amount of that issue? What is the amount of the customary dividend?

Mr. CULP: I think it takes three million dollars per annum to pay five per cent.

Judge HILLYER: Five per cent. on sixty millions?

Mr. CULP: We have never paid anything on the common at all.

82 Judge HILLYER: That is the annual dividend that was passed?

Mr. CULP: We have a semi-annual dividend; it has been two and half per cent. semi-annually, or five per cent., for some years. We made one reduction to two per cent. semi-annually, and to one and a half per cent. semi-annually; we paid one semi-annual dividend of one and a half per cent.

Judge HILLYER: What was the date of that? If you don't remember I won't trouble you.

Mr. CULP: We paid that dividend last spring.

Judge HILLYER: You cut that dividend to one and a half per cent., which should have been two and a half?

Mr. CULP: Yes, sir.

Judge HILLYER: Now, when is the next one due?

Mr. CULP: The last one we didn't pay at all.

Judge HILLYER: When was that due?

Mr. CULP: It would have been declared—it is payable, I think, in October, but it is declared earlier than that, declared in July. I never got one of them myself. This is on the preferred stock only, sixty million dollars. We have never paid a cent on the common stock.

Judge HILLYER: Just a question or two that occur to me: 1907 was about the biggest year you have had, wasn't it?

83 Mr. CULP: The year ended June 30th, 1907, was the biggest year we have ever had.

Commissioner CALLOWAY: Your net income for March, this year, was what, compared to 1907?

Mr. CULP: You refer to the net system earnings?

Commissioner CALLOWAY: Net earnings of the system.

Mr. CULP: The net earnings for the month of March this year were $1,067,000.

Commissioner CALLOWAY: I mean as compared with 1907.

Mr. CULP: $1,067,000, against $813,000 and odd.

Commissioner CALLOWAY: That is an increase of about how much?

Mr. CULP: Two hundred and odd thousand dollars.

Commissioner CALLOWAY: In April how was the net earnings?

Mr. CULP: One million and fifty-seven and odd thousand dollars.

Commissioner CALLOWAY: Against what?

Mr. CULP: Against seven hundred and eighteen thousand and odd, an increase of $339,000.

Commissioner CALLOWAY: In March it was $255,000 and in April $339,000?

84 Mr. CULP: Yes, sir.

Commissioner CALLOWAY: In May?

Mr. CULP: Nine thousand increase.

Commissioner CALLOWAY: Have you made up June yet?

Mr. CULP: No, sir.

Commissioner CALLOWAY: It seems that for March, April and May the net income was larger than in 1907, which was the big year.

Mr. CULP: Yes, sir; accomplished, as I say, by this drastic reduction of expenses, which must be temporary, in the order of things. Mr. Thompson calls my attention to the fact here that while the year ended June 30th, 1907, was the greatest gross year——

Commissioner CALLOWAY: It was not the greatest net?

Mr. CULP: No, sir; it was less than 1906.

Mr. THOMPSON: Nearly two million dollars.

Commissioner CALLOWAY: You mean there was a big business, but not so much net profit?

Mr. THOMPSON: So the comparison with March, April and May of this year gives greater opportunity for better net results.

Commissioner CALLOWAY: That is right.

85 Mr. THOMPSON: Than in 1907. While the figures given by Mr. Culp show an increase in the net on the system as a whole, in March showed $220,000, there was a decrease in that same month in the net earnings in Georgia of $1446.00.

Commissioner CALLOWAY: 1907 was your best gross year, but 1906 was your best net year?

Mr. THOMPSON: Yes, sir.

Mr. CULP: Take the business of Georgia, all of it, interstate, intrastate, business that has origin or destination in Georgia and that passing through Georgia, all of it, we show for the State here, in the month of July, 1907, a decrease of $89,500 in round figures.

Commissioner CALLOWAY: That is gross?

Mr. CULP: That is net. We show in August a decrease of ninety thousand three hundred and odd; we show in September a decrease of fifty-one thousand five hundred and odd; we show in October a decrease of ninety-two thousand and odd, in round numbers; we show in November a decrease of sixty-eight thousand dollars; in December eighty-two thousand five hundred; in January we show a decrease of seventy-six thousand dollars; in February we showed a decrease of fifty-five thousand dollars, in round numbers; in March we show a decrease of $1,446; we show in April an increase of $221,000. Now, it is a matter of common knowledge, I presume, that everything that we use has increased in price right along; I haven't with me a detailed statement of the articles, or of any important amount of them, to show what the increase is, some of them as much as a hundred per cent., fifty per cent., twenty-five per cent., seventy-five per cent., all those increases.

Commissioner CALLOWAY: Isn't the tendency right now to decrease in the stuff you use?

86 Mr. CULP: I don't know that it is. We are paying right now for coal, full price; there has been no reduction in that.

Commissioner CALLOWAY: Cross ties?

Mr. THOMPSON: We are paying full prices, increased prices. Rails have been advanced.

Mr. CULP: There has been no important reduction in any item that we purchase that I call to mind.

Commissioner CALLOWAY: Common labor is cheaper, isn't it?

Mr. CULP: Yes, sir, some cheaper, a very little. We do find this: that, employing less men we are able, perhaps, to cull out those that are inferior; therefore, we are getting common labor, better service per man than we got two years ago; but just as soon as business shall revive, and we have to take on more men, we may not be able to get such superiority, or rather, lack of inferiority.

Now, in 1904, our taxes were $1,400,000, in round numbers; in 1905 they were $1,382,000; in 1906 they were $1,500,000; in 1907 they were $1,630,000 and odd, and in 1908 they were $2,027,000, or an increase of fifty-two per cent. Now in the State of Georgia, in 1904, our taxes were, in round numbers, $61,000; in 1905, $69,000; in 1906, $68,500; in 1907, $92,700, in round numbers; that is an increase of fifty-two and two-tenths per cent. as between 1904 and 1907, in the taxes.

Judge HILLYER: Does that embrace all taxes, state, county and municipal?

Mr. CULP: That is the taxes in the State of Georgia, all the taxes in the State of Georgia.

Now, the Commission has very properly exercised a good deal of care, I might say strictness, with respect to the condition of our track, and the condition of our depots, and the running of
87 our trains, and that all means more expense to us. I suppose the Commission will continue to do that, and having in mind our condition, they will be as lenient with us as they can, but nevertheless they will, under the obligation put upon them by the law, continue to require us to make these expenses, both as to depots and as to the track, and as to train service, etc.

Now, in comparing this past fiscal year ended June 30th, 1908, with the fiscal year ended June 30th, 1907, I call the attention of the Commission particularly to the fact that the showing for the last eight months, say, the last seven months, the last seven and a half months, was much worse than for the whole year. As I have said, while our earnings in Georgia commenced to fall off in the month of September, they did not commence to fall off over the whole system, but in the period from November 15th to June 30th, 1908, November 15th, 1907, to June 30th, 1908, they fell off five and three-quarters millions, or, to be exact, $5,700,000.

Commissioner CALLOWAY: That is gross?

Mr. CULP: In gross; yes, sir. That was in the last seven and a half months of the year, and the heaviest of that falling off is in the last months of that year; and that is what we are going to be up against from now on; unless business should revive in this present fiscal year, we are going to show a great deal more falling off in the year than we did in the year ended June 30th, 1907.

For the seven months from September 1st, 1907, to March 31st, 1908, the passenger revenues of the Southern Railway for the entire system, which included Georgia, showed an increase of $102,000 as compared with the same period of the previous year, and in the State of Georgia alone they fell off $103,000; in other words, if there had been no falling off in Georgia we would have shown a hundred thousand dollars more increase.

Now, in the eleven months ended May 31st, 1907, the decrease in the net revenue of the Southern Railway, on the entire system, was $1,200,000; in ten months, not including May, $600,000, or fifty per cent. of this decrease on the entire system, arose from the operations of the Southern Railway lines in the State of Georgia; in other words, in ten months, on the lines in Georgia, there was a decrease in Georgia of half of the total decrease over the whole system for the eleven months.

88 I haven't got this statement in Georgia for 1905, at least I don't seem to have it before me, but in 1904, under the rates that were in effect at that time, and which rates were reduced in February, 1905, our net earnings in the State of Georgia were a million and a half, or $1,525,000; now, for two months, estimating two months of this year, that is lessened by $720,000, or approxi-

mately fifty per cent. of the falling off in net earnings in the State as compared with 1904, when our business was very much less than it has been in a part of this 1908, 1907-8, some less than the whole year, taking the whole year through.

Commissioner CALLOWAY: What was the net earnings for the entire system for the eleven months up to May 31st?

Mr. CULP: $9,463,000.

Commissioner CALLOWAY: $9,463,000?

Mr. CULP: Yes, sir.

Commissioner CALLOWAY: And the decrease was one million and something?

Mr. CULP: The decrease was $1,213,000 and odd, off of that, and over half of it being in the State of Georgia.

Commissioner CALLOWAY: Six hundred thousand and some odd in Georgia?

Mr. CULP: Yes, sir.

Commissioner CALLOWAY: How much do you estimate this advance in rates would bring the railroads in from Georgia every year, the advance going into effect August 1st?

89 Mr. CULP: It is only a guess. Mr. Winburn and I were talking about that this morning, what the business of Georgia, the increase in B, C, D and F would be, and I said to him that I thought it would be seventy-five thousand dollars.

Commissioner CALLOWAY: In the whole State?

Mr. CULP: Yes, sir; but that is a guess. Now, you understand me, that is not the increase within the State of Georgia; it is the increase of the whole Southern System, based upon this increase.

Commissioner CALLOWAY: That is the Southern System?

Mr. CULP: Yes, sir.

Commissioner CALLOWAY: What would you estimate all of the railroads entering Georgia?

Mr. CULP: I don't know.

Commissioner CALLOWAY: I thought maybe you knew about what proportion the Southern Railway hauled of those classes.

Mr. CULP: I do not; but I am sure that seventy-five thousand dollars will be a full estimate of the increase in the Southern Railway's revenue on the business of Georgia, covered by Classes B, C, D and F.

Now, Mr. Chairman, I think all those figures, or a great many of them, I have given you, are with the Commission already; possibly the net earnings of the system are not; I don't know about that. I should have mentioned in my remarks that the rates on grain and its products are simply a restoration of the rates that were in effect in 1905.

Commissioner CALLOWAY: This is an advance of just exactly what the decrease was in February, 1905?

90 Mr. CULP: As to grain and its products. Now, as to the rates which are being considered, the reduction varied somewhat in 1905, but take Atlanta as one point, the reductions were from nine cents down to two cents per hundred pounds.

Commissioner CALLOWAY: Nine cents first class?

Mr. CULP: Yes, sir; down to two cents; now, the advance, so far as they have gone with it, and that, as I say, has not been finally determined upon, is seven cents on first class down to one cent on some of the commodities, and probably some of them, no advance at all.

Judge HILLYER: Tell us what was done at Louisville; how far did the consultation there go in pointing to actual results?

Mr. CULP: It was the consensus of opinion there that the railroads ought to properly have some advance, and while a great deal of work had been done by a special committee of expert traffic men, the best traffic men that the roads have, to go over the rates and correct any inequalities, and recommend such advance as might be clearly defensible in the minds of every one of them, and not bear hardly on anybody. Now, that committee reported, but the actual going over of the rates would be done later by the Conference Committee, instead of this sub-committee, and that Conference Committee has not yet gone over those rates, or done its work; it will do it, though, very shortly, I presume.

Judge HILLYER: So there has been no actual notice required by law sent to Washington, except as to grain and grain products and meats?

Mr. CULP: Yes, sir.

Judge HILLYER: Let me ask you this: Did the Southern Railway pay dividends on that common stock in 1904?

91 Mr. CULP: Never have paid a cent.

Judge HILLYER: 1904 and 1905?

Mr. CULP: Never, from the organization. The Southern Railway Company was organized in 1894, and up to this day the Southern Railway Company has never paid nor earned any dividend on its common stock.

Judge HILLYER: What dividends has it paid on the preferred stock?

Mr. CULP: I can probably tell from one of our annual reports.

Judge HILLYER: In general terms, did it pay dividends on the preferred stock?

Mr. CULP: They commenced with one per cent. and increased gradually until they got up to five per cent.

Judge HILLYER: What did they pay in 1904 and 1905?

Mr. CULP: I think they had gotten up to five in those years.

Chairman MCLENDON: I think it was a five per cent. stock in those years.

Mr. CULP: This doesn't show (referring to memorandum), but in 1904 and 1905, I am sure the dividend was five per cent. in those years. Here is the annual report of 1907, the last annual report we have issued, that shows, and this indicates the increase in expenses over 1906 over the year ended June 30th, 1906, the amount paid for wages $1,044,000, cost of materials, $981,500—or $487—overtime, $403,000, increase in loss, damage and injuries, $902,000; sundry increase, $151,586; in taxes, $131,697. There was a

92 total of nearly five million dollars in that year over 1906. Those were expenses that we had to incur and expenses that we couldn't control.

Judge HINES: Did the reductions made in 1905 in Georgia amount to two million dollars in your net freights?

Mr. CULP: I never thought so; I thought that was too much, a great deal too much.

Judge HINES: Did you restore all the reductions made in 1905?

Mr. CULP: No, sir.

Judge HINES: How much too much was two million dollars?

Mr. CULP: I don't know definitely.

Judge HINES: I mean for Georgia.

Mr. CULP: I wouldn't have any guess on that.

Judge HINES: What proportion of the reductions of 1905 have been restored?

Mr. CULP: Only B, C, D and F.

Judge HINES: What proportion of the whole?

Mr. CULP: It will be only a guess. In tonnage that would be not over one-fourth to one-third of the total tonnage of all kinds coming into the State from outside, and covered by the rates which are being considered now. As I say, I think $75,000 would be
93 a full estimate of the increased amounts; I understood Mr. Smith to say $78,000—$150,000, and the Southern Railway and the Louisville & Nashville Railroad carry possibly, over their rails, I think by far and away the largest part of the business passes over some portion of their rails into the South, so that probably, over the whole South—I dislike to make an estimate, because it is only a guess, and I might be wrong, but when we submit that the $78,000 and the $75,000 make us $153,000, and that is practically all the advances on B, C, D and F into the South, and those are by far and away the biggest part of the business, the whole advance would be probably something over $200,000, $250,000, maybe, over the whole South, over the whole territory. Now, I don't lay too much stress on that, because that is only a guess, and I may be wide of the mark.

Commissioner CALLOWAY: Mr. Smith said $78,000 was about forty per cent.; that would be something over $200,000.

Mr. CULP: Yes, sir; that is what he said.

Commissioner CALLOWAY: $200,000 to $250,000 would be your estimate, then?

Mr. CULP: Well, I am willing to make a guess at something over $200,000, perhaps $250,000.

Now, when we realize our condition, we can probably realize it more than even this Commission can realize it, certainly more than the public realizes it. We know that it is necessary—I speak for the Southern Railway, and I speak, I am sure, that is the case with the other railroads—necessary they should get some more earnings, nobody, I imagine that nobody, no fair-minded man, would want the railroads to even get in jeopardy of any insolvency; they would want them to be safe; they would want to keep their credit, let them keep their credit up. Now, we can increase our earnings by increasing the rates, or we can increase them by reducing wages, or we can increase them by getting more business. Now, the railroads

can't make the business for the general public, but the railroads can aid in making business, if they can get money to spend and go on with improvements, if they can have their shops running full, and if they can increase the number of men on per mile of rail-
94 road, and all that, if they can commence to buy, if they can open some of the sawmills, if they can give some orders to the car works, and thereby cause the shipment of lumber, and of pig iron, it would start the things, it would help business; but we can't even start until we can increase our net earnings, until we can get more money, we can't do it; and if we are to be, if we should be kept down to our present condition right along, we will not only be trimming mighty close to the edge of danger, but we can't resume the purchase of things, we can't aid to the extent of purchases we would like to make, in increasing the business.

Now, we haven't been able, so far, to make any general reductions in wages. You all know that that has been the subject of mediation, first of negotiation with the union labor, and then, failing to reach an agreement, the subject of mediation, and it was recommended that the thing go along until the first of July, and see if business conditions have not improved, then we might take it up again; well, it hasn't improved; nevertheless, it has gone over now until October, to see if things won't improve. Meanwhile, some of the roads have made some reductions; some of them, I believe, have put back those reductions, or some of them. They haven't put back ours; they haven't put mine back, I know. Therefore, it isn't practicable to make any reduction in the rate of wages; it is not in our power to increase the business generally, and, therefore, the only way that we can get more money to do that work which we ought to do, which it is to the interest of the public and ourselves that we should do, is by making some moderate increases in our rates. And I could wish, and do wish, that the members of this commission could only see their way clear to say to the people that this is not an improper advance, that it is a proper advance, and the railroads ought to make it.

Judge HILLYER: Before you sit down, let me ask you this, just to draw you out, and compare views on the subject, though I don't mean to commit myself about it at all; but now, if there were reductions in rates in 1905, which were followed by quite a large increase in gross revenue, what assurance have you that, by an increase of freight rates, made under present conditions, there will be an increase in gross revenue? In other words, don't it tend to show that, by the reduction in rates in 1905, it had some effect in stimulating business, and to such an extent that the actual revenue was greater?

95 Mr. CULP: I am only expressing an opinion now; but it was then, is now, and has been my opinion, has been and is now my opinion, that the increase in tonnage into the South was not stimulated at all by the reduction in rates in 1905; it would have been just as great as it was if there had been no reduction at all. That is my view about it. My view is now, that these advances

which it is proposed to make will not have the effect of causing a ton of freight less to be shipped.

Commissioner CALLOWAY: Do you think it would make a ton more [to] be shipped?

Mr. CULP: No, sir.

Commissioner CALLOWAY: You don't think it would affect it at all, the raise?

Mr. CULP: I don't think so. It would simply give us a little more money on that which we carry. The commission, of course, is aware of this, but I want to say it: that these advances are not confined to Georgia at all; they cover the whole South, and they cover some territory which was not reduced in 1905; not in this section, however.

Judge HILLYER: One other question, as to the town of Commerce, that has made a report; that is on your line, isn't it?

Mr. CULP: Yes, sir; on the Athens Branch.

Judge HILLYER: They estimate for Jackson County, the county in which that place is located, three hundred and eighty-nine cars per annum of the meat products and grain products shipped into that county. Now, that is a little over a carload a day for a year, for the whole county.

Mr. CULP: That, I suppose, takes all the stations in that county.

Judge HILLYER: That don't seem to be very great, say four hundred cars; estimating the increase at eight dollars per car,
96 that would make $3200 for one county, and there are a hundred and fifty counties in the State; that would run up to four hundred and fifty to five hundred thousand dollars. What is your opinion about that?

Mr. CULP: In the first place, I think that is too much; I think that estimate is too high. It can be told, I imagine, exactly how much goes into that county from the territory from which it is proposed to advance the rates; as our road reaches Commerce, the only one that does reach it, we could tell exactly how much stuff goes in there annually. Now, in the second place, that county is in one of the most productive sections of the State. There are many counties; there are some counties in the State that, if that county gets 389 cars, would not get 89, or 39, probably. And furthermore, when I made my estimate as to the Southern Railway, there is lots of territory we don't serve at all, we hardly serve it even as an intermediate carrier, some of the counties. If the commission desires it, if it thinks it important, I could have the receipts of grain and its products at Commerce for a year, obtained.

Judge HILLYER: I hardly think that is necessary; it would only be a specimen of one county out of a hundred and odd; but this estimate is signed by the Board of Trade, *by the Board of Trade* and by Mr. Williford, as president of the Board of Trustees, and Mr. Carson, secretary and treasurer of the Board of Trustees; I suppose that is a name for the town councilmen, perhaps; and then by a lot of shippers, Mr. Mann, and Mr. Anderson, and Mr. Harber, and Mr. Montgomery, and Mr. Little, and others.

Mr. CULP: We know there is a great deal of exaggeration when you come to estimating the effect of an advance in rates, which is

not unnatural. The chairman has referred two or three times to some remarks of Vice President Brown, of the New York Central Railroad, and I have no doubt you have all read those remarks; but in an address he delivered in May last in Chicago, he cited an indicative of this proneness to exaggerate the fact that a creamery up in Iowa, Clarinda, in which he happened to be interested, he being out there on a visit, desired to buy some cast blue steel,
97 and that steel, it seems, is very high priced, fifty cents at Poughkeepsie, where it is made; they needed some immediately, the superintendent reported; they telephoned to a neighboring town or village or city, and they were told yes, they could let this creamery have some, at a price of 90 cents a pound. Some objection to that price was made, that it was worth only fifty cents at Poughkeepsie, where it was made, and where they all get it from, and the reply came over the phone: "Well, the freight rates have been advanced lately, and we have to charge this on account of the freight." Well, now, Brown is up in the freight business, and he *bring* [being] right there, figured, and showed that the advance in the freight was less than one cent per pound. That was communicated to this firm who had the steel, and they said, well, they would consider it, and finally they replied they could sell at sixty cents a pound, which was ten cents a pound more than it could be bought for in Poughkeepsie. Now, except that Brown or somebody had been there, who knew about this thing, it might have gone that this enormous advance of fifty per cent. was due to the increase in the freight rates.

Another case he cited was in a mercantile establishment, in which he was also interested; they raised the price of clothing ten per cent., charged to some increase in the rate; the suits were from ten to thirty dollars before they advanced them from one to three dollars. Now, Brown figured the advance on a suit, and it was less than five cents a suit; my recollection is it was four, but it was less than five cents; and yet they were adding one dollar, and three dollars, and charging it to the advance in freight rates. I have no doubt these people were honest enough in it; they said: "We have got to make some advance; freights have advanced; what will we advance? Ten per cent. That will cover it."

Commissioner CALLOWAY: On Brown's estimate, that would be a big thing for the merchants in this country; they would all make fortunes.

Chairman MCLENDON: Anybody else have anything to say?

Mr. R. A. BRAND: The Atlantic Coast Line didn't get notice from the commission. You slighted us in filling out your notices, and I didn't know anything of this hearing until about noon yester-
98 day, and as I had to leave at three o'clock, we were unable to get up any data. We have only been able to get up such data as that already filed with the commission.

Mr. Culp has covered the general ground so well, I will not burden you with anything further on that line. The Atlantic Coast Line, of course, like the Southern Railway and the other carriers, had about reached the parting of the ways; the margin between earnings and operation was so close that we were confronted with one of

three things; either make some slight advances in our rates, or make a very radical reduction in wages, or stare bankruptcy in the face. So, after giving the matter very serious consideration, so as to place the burden where it would rest lightest, you might say, we reached the conclusion to advance the rates on B, C, D and F, the advances with which you are familiar, three and two cents per hundred pounds. Now, generally speaking, those advances on those commodities are simply restoring the rates to where they were in 1905; they were reduced, generally, about the same number of cents in 1905.

It has just occurred to me that, so far as the Atlantic Coast Line points in Georgia are concerned, about a year ago, to satisfy our people, and to bring the local stations on the Atlantic Coast Line a little closer to the common points, we made some very radical reductions in the rates from the East and from the West to all of our local stations in Georgia. Some of those reductions were, I think,—I haven't the figures; I am sorry I didn't—I think as much as twenty cents per hundred pounds on first-class. For instance, we will say, take Cairo, or take Pelham, or take Boston, or take Sylvester, points between common points, we brought those stations much closer together; we have the rates very nearly the same as to the common points on either side. Therefore this proposed advance to seventy-five per cent. of the stations on the Atlantic Coast Line in Georgia will leave the total rates to these points, from the West and from the East, even if we make the advances which we now propose, all around, less than they were in 1905.

Now, I am sorry we haven't got our figures up to date, so we can state to you the condition of the Atlantic Coast Line, as to its gross and net earnings. However, I find for nine months of the last fiscal year, nine months ending March 31st, 1908, as compared with the same months of 1907, our gross earnings, freight and passenger, show for those nine months only a reduction of about one hundred thousand dollars; the net earnings show a reduction of about
99 nine hundred thousand dollars. In other words, after paying a dividend of six per cent. for the year ending June 30th, 1907, we had a surplus of $125,000 in round numbers. Now, for the first nine months of the last fiscal year, that is, ending June 30th, 1908, our surplus had decreased $935,000, wiping out the surplus of $125,000, and a still further decrease of about $800,000. Now, April and May reduced that a little. We haven't the figures yet for June; but, as I say, our total earnings for the year ending June 30th, 1907, was the largest in the history of the company, but our net earnings were very much smaller than the preceding year.

Now, as to the passenger earnings in Georgia, we find, for eight months, September to April, or ending April of this year, that is, when the reduced rates were in effect, that the increased number of passengers, intrastate, hauled, was six per cent.; but, notwithstanding, we hauled an increase of six per cent. in the number of passengers, our decrease in passenger earnings intrastate, amounts to eighteen per cent., or $87,725, for those eight months. The re-

duced passenger rates has not stimulated passenger business, so far as we are concerned, except six per cent.

Now, our freight earnings for seven months, ending with May of this year, as compared with May of last year, or six months, I should have said, shows a decrease in our intrastate earnings of $141,774, a decrease in our interstate earnings of $129,948; so that our total decrease in freight earnings for the six months ending May 30th, as compared with the same six months of the preceding year, show a total decrease of $271,722.

Commissioner CALLOWAY: That is gross?

Mr. BRAND: Yes, sir. Now, I believe it is a self-evident fact that every element entering into the make-up of transportation has increased, and I believe that this moderate increase that we propose will put the burden where it properly belongs. Certainly, so far as the advances we propose are concerned, it will amount to only ten or fifteen cents a family.

Now, is it best if we could reduce the wages of our employés, is it best? Now, take a man getting a hundred dollars a month, is it best to make that family stand a reduction of a hundred and twenty dollars a year, or make the families in that neighborhood
100 stand an increase cost of twenty-five cents? It seems to me, to ask the question is to answer it.

Now, as I say, we have given very serious consideration as to where to put these increases. We recognize, on certain commodities, we can't increase them; so that I believe that our increases, so far as the Atlantic Coast Line is concerned, and so far as grain and grain products and packing house products are concerned, will amount to a mere bagatelle.

The commission spoke of the county in which Commerce is located receiving 389 cars of grain and grain products. Mr. Chairman, you are familiar with the counties through [which] we run, and I am sure there isn't a county in the State of Georgia through which the Atlantic Coast Line runs—a single one, barring, possibly, the county in which Albany is located—that would receive as much as that.

Judge HILLYER: One car a day.

Mr. BRAND: 389 cars, did you say, a year?

Judge HILLYER: 389.

Mr. BRAND: Take that country from Waycross to the Florida line, and Thomasville to the Florida line, and from Brunswick to the Florida line, and I tell you we hardly get a car a month down there to some of those counties. We are poor people.

Commissioner CALLOWAY: It wouldn't hurt you much not to get the increase.

Mr. BRAND: We have got to get some increase. To be frank with you, I don't think the increase we propose is going to furnish us all of the necessary earnings. I think it will help some, and we hope that with it, and with that revival of business that we are all hoping for, we will be able to stem the tide. But we are right up against where we have simply got to have more cents in a dollar than a hundred.

I don't want to burden the commission with any general statement. I am sorry we didn't have time to give you the exact figures.

101 Chairman McLENDON: We have got your figures.

Mr. BRAND: You have all of our reports?

Chairman McLENDON: We have all of your figures, down to the 1st of June.

Mr. BRAND: I think so.

Chairman McLENDON: The figures you have been reading are on the table here.

Mr. BRAND: We haven't the June figures, but June, so far as we can judge, looks worse than May. I hope the Commission may see its way clear to indorse this. We have a right to expect that. You are familiar with the conditions; you are from different parts of the State, and the conditions are right before you; and they are so apparent, and so self-evident, until, as I say, I hope we can ask the Commissioners to unanimously indorse what we have done. That is what we would like.

Chairman McLENDON: Has anybody else got anything to say on this subject?

Mr. JACK J. SPAULDING: Mr. Sevier asked me to say something for him. I am very reluctant, in a body of skilled traffic men like this, to undertake to say anything on a traffic question. But, so far as the Seaboard is concerned, the road is in its grave; it can't be harmed by an misstep I may make; they are there already, and nothing I might inadvertently throw out would hurt it.

This situation, from a study of it, from a general standpoint, from an observation of it over the country, reminds me of an incident that happened in a little town where I was raised, when the first pug dog appeared on the streets. There was a very fashionable lady appeared with a pug dog of the latest cut. His tail was curled up so tight that he walked on the tips of his hind toes, and showed all of its rear in great shape. The crowd looked at it until it got out of sight, and there was a fellow sitting there, grunted and said: "There's one of two things going to happen to that dog."

102 Some one said: "What is it?" He said: "He has either got to uncurl that tail, or his rear will tear open." That is the way the railroads are. There isn't any use to preach to these people; they have been eating seed corn, and they have pretty nearly eaten their seed corn up. They have got to where they have got to get something back.

I think the most eloquent illustration of what they have done is set forth by the fact that, notwithstanding the newspapers, have been heralding all over the country that there was a terrible outrage about to be perpetrated on the people; there are only four or five points represented in the way of protest before the commission, and I believe if they understood thoroughly the situation, they wouldn't be here. It has been held out in the papers that there is something horrible going to be done. I have noticed it in the papers daily, calling on the people to arise; but they don't arise. I don't believe the people are hurt. What hurts the people is discrimination and

rebates. I don't believe the amount of the rate collected out of the people is ever a source of complaint to them, or grievance. It is a question of whether they are discriminated against, or unjustly dealt with, as compared with their neighbors. There isn't anything of that kind in this; it isn't going to raise a disturbance all over the country; it isn't going to produce any inequalities; in fact, it is rubbing out some.

As I understand it, you gentlemen are sitting here under our recent law, looking at this thing from the standpoint of the public, to see whether or not the State of Georgia is getting such a rough deal in this matter; that this commission ought to go before the Interstate Commerce Commission to prevent the raising of the rate that this commission hasn't primary jurisdiction over. In looking at it from that angle, here is the situation, all over the Southern territory: they are going to affect this whole territory, and there isn't going to be any discrimination; there is no inequality; there is no injustice between any one section, or one city, or one point, and any other point. It is something that affects all alike. And it does look like these roads here, there is one of three things going to happen—there were two to the dog, but three here—they have either got to have a raise in the rates, they have got to have a raise, if they are to live, or they have got to get an increase in tonnage. That is inevitable. They can't live on what they are doing. They don't want to come here and herald themselves, and having the papers telling it out to the world, that they are all bankrupt
103 and insolvent. I know what the others think about it, and I know what the financial world thinks about it. I know how they feel about it. Here is the Legislature sitting over here, loading them up with damage suits, and passing damage suit laws. Here are we, every one of these men will tell you their damage suit business has increased fifty to sixty per cent. in the last eighteen months or two years, and yet they are going on out there, socking it to them right straight along; there isn't anything stops it; they are loading them up with those things all the time.

Nobody wants any reduction of taxes; nobody wants any reduction of these damage suits, or any of these penalties, and all that. That goes right straight ahead. What I believe the people want, and what I have always believed, absolutely, is a leveling down of rates; what the people want, from the man in the forest, and the man in the counting room, and everywhere else, what they want is efficient service. He wants a fair deal. He don't want to be discriminated against. He don't want any man given rebates against him. He don't want any other point favored over his point. But he wants efficient service, quick delivery, prompt handling of his business. I believe the people of this country are behind the proposition to let the railroads collect enough, doing it equitably, rightfully and fairly, without discrimination, and without rebates, to put them in a position to handle to the highest efficiency the development that this country calls for.

You can keep cutting down, and cutting to the point where these men can't live, and when a revival of business comes, there isn't

one of them that will be prepared to stand the shock of it. You will hear a howl go up all over the State, that they can't get cars, and can't get service. Why? Because now that they have an opportunity to meet that, they haven't got the means to do it.

It is within my knowledge, I know what is being spent right around this town, because I happened to have a pretty big hand in it, and the present prosperity of this city, the present prices of her real estate, the present thrift and development that you see right here in this town, is the direct result of what the railroads have done here. They have spent something like ten millions of dollars right around this town here, in terminals, and double tracks, and yards, and facilities, and buying land, turning it loose here in development. That was in 1904, 1905 and 1906, along there, the L. & N., with their tremendous yards; the Central and the Southern Railway, with its new yards and its double tracks, and the Seaboard, all of
104 them, every one of them. I believe that what the people, down in the rank and file, and they understand it, they understand it a great deal better than we think they do sometimes, all over the country what the people want is service; they want the public protected against discrimination, and rebates. That is a thing the people of the country had a right to feel outraged about, that some man got some advantage over his neighbor, and that some community had an advantage over another community. Is that business, like they say, to put five cents on a suit of clothes? That is purely nominal. I have seen it here in the shoe rate, in this town, that we lawed about, and all that. I have some interest in a shoe store, and I know how that thing works out; I know how it affects the selling price; I know who pays it, where it comes from. That isn't what the people want; they want service. And I believe the sound economy of this situation is to let these people charge enough, without discrimination, and without rebates, to conduct a high class business, to pay their taxes, and pay labor, to keep up an efficient service, and to equip the roads to meet the development and progress of the country. And I don't believe the people will kick on the price they pay for it. They want good service, and they are willing to pay for it.

Now, it isn't in the southeastern territory; it is in every part of the United States; they have all been increased. The rates have already been increased in the Southwest, through the Southwest. They are moving on it through the Central territory. It is up all over the country. And the greatest railroad man in this country, I read in this morning's Commercial, an interview with Mr. Hill, setting this thing out; the proposition is, they ought to do it, and unless they do, when prosperity comes, they are going to be crushed down in the mud again, because they are not preparing for it; they are not keeping their rolling stock up; they are not keeping their tracks up. When a man gets a car crippled, what does he do with it? He don't put it in the shop to give work to a laboring man, and put that car in efficient shape; he can't afford to spend that money. He puts that car out in the dead yard, and gets another car, and uses that until that is crippled, and then houses that one back in there, until they

have got them piled up, because he hasn't got the money to spend on the car, and he can do without the car a heap better than he can without the money. And you all know that when business does revive, they won't have the cars to do it; they won't have the track in shape to do it, or the facilities to handle it.

105 I do believe that this situation is one that appeals to the wise, sound discretion of the Commission, that there is no inequality or injustice being done to anybody over this territory, this southern territory; it don't work a hardship on one man that don't fall on another, and it is to the interest of the whole country, the railroads, and the people they serve. Certainly, we can't reduce the wages. Here is the President of the United States took a hand in that, when we talked about reducing wages. When it was talked about here, the Commission took a hand in it, and everybody was up in arms. It isn't right to talk about it. These people have to pay as — for meat and grain as before. It is a fact that on a large part of the stuff on which these rates are to be increased, the price has not diminished; take corn, flour and oats, and that stuff, a man has to pay one-third more than when the railroads were making a profit out of hauling it, and it does look like that might bear the burden of keeping up these yards, these things, for the benefit of the public.

The commission that fixes the rates and regulates the properties, that commission is charged with the duty of letting that concern get enough to keep itself up, just as much as it is charged with the duty of keeping the citizen from being imposed upon, and if the commission trims that public servant down to where it can't discharge its duty and serve the public as amply as the public demands, it is doing them a worse hurt than if they suffered some individual to get a rough deal, because the whole public suffers.

I believe the protection of the traveling public, and the efficient development of the commerce of the country calls for these roads to have this raise, to meet these increased expenses, to meet these losses in business, to meet the increase in wages; that is up, and will stay up, and meet the increase in living expenses, the increase in the cost of material that goes in their track, and everything that goes to make up transportation. You, gentlemen, have heard all that. You know more about it than I do; but Mr. Sevier asked me to say something, and I thought I would trespass on your time and attention to say that much.

Chairman McLendon: Has anybody else anything to say?

Mr. H. F. Smith: Mr. Chairman, I had hoped we would hear from the Central of Georgia Railway, and particularly from the

106 West Point Road. Mr. Wickersham is here, and is an operating man, as well as a traffic man, and I would have appreciated very much hearing his explanation of the conditions on his line that required some increase in his revenue; he is responsible for the expenses. I will say, we are here out of respect to the commission, without very much to submit that would be of interest, or that would be new to the commission. We understand the commission has our reports. Am I correct, sir?

Chairman McLendon: Monthly reports?

Mr. SMITH: Reports of operations of our line. And I have reason to believe that the honorable chairman has a much more expert knowledge of what those statistics show than I have, because he has probably given them greater attention and consideration. But I would like to say, Mr. Chairman, that the absence of the public, shippers, at the conferences on the 14th and 16th and to-day, to my mind, conveys a specific compliment to this commission; and after having stated that, I want to also say that it is very gratifying to maintain the belief that it is also complimentary to the railroads of the State; to the commission, because it indicates that the public has confidence in the ability of this commission to conduct its transportation affairs, and it is a compliment, in my knowledge, to the railroads, because it conveys to my mind a return of confidence in the justness of the managers of these properties. And I want to say that, as far as I have knowledge, and I have quite an expert knowledge of the operation of railroads in the South—I might have said an expert knowledge of the men and their methods and purposes, who operate these roads in the South—and I believe they have been and are now being operated with the strictest honesty and purpose to deal fairly with all interests.

The agitation that we have noted with some regret, brought about by some of our newspaper friends over the disposition on the part of the railroads to seek some relief from present conditions by revising rates, has been, in my judgment, exaggerated; the conditions have been exaggerated; what the roads contemplate doing, I think has been, perhaps, misunderstood by some of our writers. But the action of the carriers up to this time, the carriers of the South, has been to review the existing rates, removing discriminations, as Mr. Culp has explained, and, where practicable, to secure advances in certain
107 rates without unnecessarily burdening the public, or unreasonably burdening the public; and we don't believe the action taken up to this time will have that effect; we don't think it will prove to be a burden.

Now, I am not prepared to submit any statistical information of moment, but I will say, for the benefit of those who have not specific knowledge of the operation of the Chattanooga Road, that, commencing in November, 1907, the gross earnings of the Chattanooga Road, including all of its branches, and the Western & Atlantic Railroad, showed most radical decreases, amounting in eight months, November to June, November, 1907, to June, 1908, the decreases amounted to $1,540,000, in round numbers. While prior, we will say, for the year ended June 30th, 1907, the fiscal year, the Chattanooga Road was earning approximately one million dollars per month, with the $1,540,000 decrease in eight months, you can see how serious the decrease in traffic has been.

Now, I appreciate that it has also been ten times greater to the communities that these railroads of the South serve. For instance, if the gross revenues of the principal roads in the Southern territory amounts—the decrease amounts—to say five million dollars a month, it is fair to assume that means a decrease in the commerce of that section that those roads serve, of, we will say, fifty million dollars a

month, and somebody is responsible for it, whoever it may be, I don't know who, but as far as the carriers are concerned, we are, by sawing wood and attending strictly to our business, going along, adjusting rates in the usual way, with justice towards all, and discrimination against none, and endeavoring to outline this condition that has confronted us for the past several months.

Now, during that period, commencing with November, the surplus, over and above interest, taxes, rentals and operating expenses, the surplus that the Chattanooga Road received from operations, commencing with November, was $16,428.20; December, $13,147.41, and January, $11,046.86. You will appreciate that a railroad cannot, the management cannot, as abruptly decrease its operating expenses and other expenses as this decrease in gross earnings was. That was very abrupt, and that commenced in November. It was greater in December than in November. Now, commencing with February, our management contemplating a continuance, saw nothing to encourage it to believe that business was going to revive promptly, commenced heroic measures to bring its operating expenses within its income; and the surplus in February was
108 $32,153; March, $70,683; April, $58,581, and May, $74,701.

We haven't got the figures for June. But I want to say that heroic measures were adopted; and, of course, it has left the organization, it has left the matter of maintaining equipment, and maintaining the track, roads and bridges in a situation that cannot be perpetuated. And [an] end has to come to that decrease or modification of expenses. It might go along maybe a few months without serious inconveniences, but we are running behind every week and every month; and, as Mr. Spalding has said, if the return of commerce was to be as abrupt as its decrease, we would all be mired, because we are not ready for it. The experience of the past rather indicates that it will not be as abrupt as the decrease was.

Now, I judge the commission is especially interested in the operations of the Western & Atlantic Railroad. I have had some statistics made up, which may be of interest. Taking that portion of the road in Georgia, we have had months where the passenger service has earned less than it cost, and there is a deficit. We have one month where the freight earnings were less than the cost of operation.

Judge HILLYER: Including the rental?

Mr. SMITH: Oh, yes; including the rental. The road has been operated one month at a loss with respect to freight, and two months at a loss with respect to passenger service; and other months, some other months, the excess has been very small. The month of February showed a deficit in passenger service of $3509 and some cents. The month of May shows a deficit in freight of $2662.33, and the passenger service that month showed an increase of $2988.58, over and above expenses. Now, there was a net or surplus for May, operating the Western & Atlantic Railroad in Georgia, of $326.26.

Now, it is unnecessary for me to say to the gentlemen representing Rome, and Atlanta and other cities, and to the commission, that no railroad can prosper, we can't progress on any such basis of earn-

ings as that and hope to survive long. The interest of the public requires, in my judgment, greater revenues, and the way to get it, without hardship, is what the carriers of the country are now giving earnest attention to, without hardship at all. The slight in-
109 crease in certain rates would never be felt by the consumer or the commission. The effect of the individual is infinitesimal.

I am one that believes, however, that the passenger rates ought not to be scaled to an unprofitable point, and the railroads profits come out of the freight rates; because, first, a great percentage of the public, a great percentage of the people of Georgia, travel seldom, and the reduction made in the passenger rates was of small importance to them; those that travel frequently, travel for profit or pleasure; a man that travels for profit can afford to pay a reasonable rate for the service, and a man that travels for pleasure can also afford to pay. There isn't a man, woman or child, black or white, that doesn't in some manner contribute, directly or indirectly, to the transportation of the products of the earth—freight service. Some day, I hope, this commission will give consideration to the passenger service, passenger rates, and let us get a reasonable revenue, reasonable profit, out of that.

This statement I have made verbally of the effect and result of the operation of the passenger service on the Western & Atlantic Road, embraces every item of passenger train earnings, including mail and express.

Judge HILLYER: I was just going to say that some of you, perhaps it was Major Hanson, drew that same distinction that you speak of, that greater desirability of fostering the income from passengers, rather than from freights only. I was a good deal struck with it at the time, and I am glad you mentioned it.

Mr. SMITH: I think we are entitled to a profit on each character of service we operate. I think the railroads are entitled to a profit out of their express service, out of their mail service, out of their carrying of passengers and then out of the freight. The fact that a passenger train earnings are very much less than freight train earnings on these roads, makes the contribution of the passenger service to the general upkeep of the road a small percentage of the aggregate, but it should carry its proportion of the burden; in my judgment, it ought to be so fixed that it would.

Now, Mr. Chairman, at the outset, you said the only way you could develop information, the only way you knew to develop information, was to ask questions. I am willing to answer such questions as I may. I want to say, however, that President Thomas is absent; our secretary, who gives attention to these matters of
110 statistics, these questions, is also abroad, away, and there are matters that I am not personally very familiar with. I only review them from time to time, as the interest I have particularly in charge demands; and I say, in a broad way, that the Nashville & Chattanooga Railway is not earning sufficient money to maintain itself in the way that it has been accustomed to do. By that, I mean that the Chattanooga Road has prided itself, the management has

prided itself on operating a pretty high class road, and wants its service to be second to none.

Chairman McLENDON: I would like for you to leave with the commission those figures showing freight and passenger earnings and expenses.

Mr. SMITH: They are not in form; I could do that. I hurriedly made up a pencil memorandum; but I can furnish you all that information, you will recall, I brought before you with our officials, with a view to discussing in the total this very matter, and we are still considering the operation, or the result of operation, of the Western & Atlantic Railroad from month to month, and it looks now as if we are going to make our exhibit based on twelve months. I judge that will probably be the statement we will come before you with finally, in order that you may have a fair exhibit.

Now, our passenger earnings on the whole line have increased; that is true. I think, of most of the roads; it is the freight business that has shown such a wonderful decrease. Our passenger earnings are a little greater this season, than for the same months last year. There seems to be a general growth in passenger traffic. I want to say, though, that the earnings on the Western & Atlantic Railroad have not increased in the same percentage that they have on the main lines north of Chattanooga, which is very disappointing.

Mr. WILSON HARDY: Mr. Chairman, and gentlemen, it is with a good deal of temerity that I rise to argue here, as an amateur freight man, as against these gentlemen, who make freight and arguing a profession, but I am somewhat sustained by the thought that you gentlemen keep it as a part of your business to sprinkle salt on arguments of all kinds.

We come not so much as a committee of protest, as a committee of warning, as that is too strong a word, from the Manufacturers
111 and Merchants' Association of Rome, an association embodying in its membership probably two-thirds of the commercial interests of the town. Rome is a city, I believe, that is allotted the privilege of being the sixth largest in Georgia. It is a city, too, that, notoriously, if not famously, has been known as befriending the railroads. We have at no time desired to bait the roads; we have generally refrained from taking part in railroad baiting, so called, that has gone on, but we feel that this increase means, probably, more to Rome, and more to the other cities of the State, than the railroad gentlemen have been able to figure out. Now, we haven't made it a matter of guesswork, but have arrived at some figures from actual facts, conservative facts, too, and we find that the increase of itself will amount, in the course of a year, to between ten and twelve thousand dollars to the City of Rome. That is based upon average shipments, shipments covering a number of years; and for the one item of flour, it means twenty-four hundred dollars; on grain, including corn, oats and hay, it means over five thousand dollars. Now, ten thousand dollars to Rome means a good deal more than ten or fifteen cents per family. We have a population of about eleven thousand, and on an average of five persons to the family, that would give us two thousand families, and that would mean an increase of

five dollars per family, which is larger even than our dog tax, a right considerable tax.

We recognize that that old statement of the lamented Rev. Sam P. Jones is more or less applicable. He said you will remember, when bicycles came in, and began to be ridden by ladies, and low neck and very decollette costumes began to be worn by ladies at balls: "If these ball ladies continue to cut down from the top, and the bicycle ladies from the bottom, and I will have to cut for the woods." We know the railroads will have to cut to the woods, if the rates all around are continued to be cut.

We have befriended the railroads, and we want them to stay in a position where we can still befriend them. We want them to sit steady in the boat, and if they will sit steady in the boat, to the best of their ability, we will try to see that nobody rocks them. If this increase is absolutely necessary, we are willing to pay the tax. If the increase is used for the bettering of their equipment, the bettering of the service, I don't think our association will begrudge it, even if it be a five dollar per family tax. The question with us is whether it will be used to that end.

We have brought ourselves into an especially favorable
112 mood with the railroads recently, on account of the great satisfaction they have given us in moving our peach crop, probably better satisfaction than in any year past. We have had absolutely no trouble. Some persons have been mean enough to ascribe it to the fact that they didn't have much to handle, and if things had been normal, they wouldn't have handled the fruit crop so satisfactorily.

Again, if the railroads will agree to make this raise only cover the hard times, we will still probably not protest. It is a great deal harder to get any person to reduce his rates, or his prices, than it is for him to get his own consent to raise it.

We want the railroads to feel that they are a part of the whole industrial system. We recognize that there is an interdependence between the railroads and the merchants and manufacturers, and we want them to stand with us. We are standing, and doing our best. Because of the hard times, we can't increase the prices of our advertising, and Mr. Irvone can't increase the prices on his nails, just because it is hard times. We are not making any money; probably a large percentage of the merchants are not making any money. We manage to hold on, and hope for better times. We don't want the railroads to put themselves out of our class.

As I said at the outset, if the railroads regard this as necessary, and if your commission, after putting salt on all the arguments here, still find that the increase is essential to the progress or the existence of the railroads, we will say, Amen.

Chairman McLENDON: Mr. Hardy, you are the editor of the leading daily paper north of Atlanta?

Mr. HARDY: The only one, Colonel; I won't say the leading one.

Chairman McLENDON: The law says this commission shall thoroughly investigate the matter of interstate rates. Now, suppose there is an application made by the shippers of Cincinnati to the Interstate

Commerce Commission, to revise the rate situation, or to reduce the rates into this territory: would you consider that a proper matter for this commission to take into consideration at all, or would you think this commission ought to shut its mind to that?

113 Mr. HARDY: I would think the duties of this commission should cover that.

Chairman MCLENDON: Suppose that there is a matter pending before the Interstate Commerce Commission at this very hour, would you think we ought to consider that?

Mr. HARDY: I believe the general public would consider that among the range of your duties.

Chairman MCLENDON: Suppose there were a case pending on an application of the City of Montgomery to reduce rates, which petition, if granted, would necessitate a readjustment of the rate situation in a large territory, or practically throughout the territory east of the Mississippi river, would you consider it the duty of this commission to study that case to ascertain all the questions involved, and to bear that question in mind in considering what you gentlemen have to say here to-day?

Mr. HARDY: Most assuredly.

Chairman MCLENDON: Suppose the State of North Carolina had a petition pending before the Interstate Commerce Commission, asking for a readjustment of certain rate situations, complaining of discrimination, as against certain North Carolina cities, in favor of certain Virginia cities, if the decision favorable to the North Carolina cities should be rendered, that being such a decision as would necessitate a review or readjustment of the rate situation extending down this far South, would you think that was a proper case for this commission to study, and to comprehend, and to work out, and to consider, as a part of its duty imposed by the law requiring it to thoroughly investigate?

Mr. HARDY: It is because we believe that, that we wanted broad men on the commission.

114 Chairman MCLENDON: Would you consider it the duty of the commission to do what the law says, thoroughly investigate?

Mr. HARDY: I do.

Chairman MCLENDON: Would you think it had done its duty unless it did?

Mr. HARDY: I would not.

Chairman MCLENDON: What would you think its duty after it investigated, to give you, the people of Georgia, the benefit of those investigations, even if favorable to the railroads?

Mr. HARDY: I do, most unquestionably. I have always occupied that position.

Chairman MCLENDON: Do you think it would sustain this commission, if it gave you the benefit of the investigation, to invite you, as a citizen of Georgia ,and all other citizens of Georgia, to sit down at this table, and say: Here are the facts as they appear to be; now,

will you help us to deny, and contradict, and disprove these facts? Do you think that would be proper for us to do?

Mr. HARDY: I think so.

Chairman McLENDON: If those facts should happen to be favorable to the railroads?

Mr. HARDY: I think so; and I would state that the Manufacturers and Merchants' Association of Rome would take the dose very gladly, and while the people of Georgia might not support that decision at first, as I said before, they ultimately would, because the people of Georgia are just.

Chairman McLENDON: The question is, what are our duties
115 in this suitation; are we to thoroughly investigate, and whatever we do develop, what are we to do with it? Are we to hide what we find out?

Mr. HARDY: That is not what we wanted a railroad commission for.

Mr. W. A. WINBURN: I would like to ask Mr. Hardy a question: He has estimated that the increased cost of freight on meat, flour, grain and hay shipped to Rome in a year, would amount to ten thousand dollars, and based on a population of about eleven thousand people, he figures that the additional cost per head would be one dollar.

Commissioner CALLOWAY: He said per family.

Mr. WINBURN: Or, on a family of five people, five dollars per family. I would like to ask him whether the grain and hay and meat and flour that is shipped to Rome, is all consumed at Rome?

Mr. HARDY: No; as I said; you might not have heard that qualifying clause, that if the population of Rome were taken as a basis. Now, that estimate didn't include the very considerable amount of grain and flour and kindred products shipped into the smaller towns in the county. Of course, all of this ten thousand dollars doesn't apply to the City of Rome; it is impossible to tell just to what territory it does apply; neither does our estimate cover more than seventy-five per cent, between fifty and seventy-five per cent, of the total amount of flour and grain shipped in under these classifications.

Chairman McLENDON: But you took no account of the grain shipped out?

Mr. HARDY: I took no account of the grain shipped out. It was impossible to do so. These are actual figures, covering grain, flour, and B, C, D and F products shipped into the leading wholesale merchants, and with an exceedingly limited allowance to cover scattering shipments. Now, your commission no doubt knows that the less than carload rates from Louisville south are the same as the carload. I
believe that is the fact, that a man can ship one sack of corn
116 from Louisville at the same rate that he can ship a car.

Chairman McLENDON: That is a battle of a generation. That will always be with us, I think.

Mr. HARDY: I am afraid it would, though we ourselves would be very much more pleased if the railroads could make their increase on the less than carload shipments, if they find an increase absolutely necessary.

Mr. C. A. WICKERSHAM: There is one thing—Mr. Hardy seems to be exceedingly fair, as I take it from his remarks, but there is one thing I don't believe he is exactly fair on, at least, I didn't so understand him to express himself, he thought that the railroads should stand the hard times, as well as the merchants and other manufacturers. I would like to ask him, if he were conducting a large business, where it was necessary to have two stores, two large rooms, possibly, and he found his business was decreasing to such an extent that it wasn't profitable for him to pay rent on both, when one would suffice, wouldn't he, as a business proposition, at least, rent, or release, or stop himself from paying rent on that store that he didn't need?

Mr. HARDY: I would; but that, I believe, applies rather to the reduction of expenses than to the increase of the rate.

Mr. WICKERSHAM: I wanted to say this, to carry that a little further; a railroad may find its passenger earnings decreasing to such an extent that the only way to recoup would be to discontinue a train, possibly, or two trains. Now, you, as a business man, can release yourself of the payment of that rent of the building you don't need; but I come around here to my good friend (Col. McLendon) and ask him to let me take off a train that is not profitable—No, sir; you can't do it. There is just the distinction; you can do things that a common carrier can't do, can't think of doing, and won't be permitted to do.

Mr. HARDY: I recognize that fact, and it was in recognition
117 of that fact that I say if it is found absolutely necessary that some increase of income be made, we have no objection.

Mr. WICKERSHAM: I want to repeat your expression of fairness, which we appreciate.

Mr. H. F. SMITH: In my judgment, the carriers should have advanced their rates during that period of great prosperity; that was the time when they were making less percentage of net earnings than they made prior to the prosperous season. But I wanted to add this: that the railroads to-day need all the encouragement they can receive to stimulate their credit; they need some aid from this commission, and every other commission, to stimulate their credit; if it goes out that the railroads of this section can't advance their rates, and it is quite apparent they can't reduce their expenses, except by reducing the service, then the credit that we need, the restoration of credit, is going to be very slow. While not for a moment implying criticism of the Courts in the lumber case, I believe that was a great blow to the credit of the railroads of this section. It indicated an impossibility to advance the rates, and the investors in railroad securities, who are watching the results of operation knew that the expenses and earnings were getting closer together every month. Now, the carriers to-day need your assistance in the way of stimulating credit.

Mr. W. A. WINBURN: In order that the position of the Central Railroad may not be misunderstood, or its condition misapprehended, I would like to talk just about ten minutes.

Mr. Chairman, and Gentlemen—I did not intend to say anything on this subject when I came here to-day; I really was not prepared

to discuss it in a thorough manner, and I knew that other gentlemen who had gone more into the matter in detail would cover the ground. They have done so, and the only excuse I have for saying anything at all is the reference that Mr. H. F. Smith made to the Central Railroad. Now, I don't want my silence to be misunderstood; I don't want the commission to misapprehend the present condition of affairs of the Central Railroad. We would be lacking in our duty, if we did not present to their attention, if they were not already familiar with it, the very unsatisfactory condition of our business and our affairs at this time.

118 Our fiscal year has just closed, but our June results have not been cast up, and I cannot give you the final results of the operations to-day. Briefly stated, during the five months, the first five months, of the fiscal year, our gross earnings increased between three and four hundred thousand dollars over those of last year; during the remaining seven months of the year there was a decrease of between one million and eleven hundred thousand dollars, and at the end of the year, we are between seven and eight hundred thousand dollars worse off in gross earnings—gross receipts—than we were last year. The net results are not as bad as the gross results, because we have made some reductions in expenses; we have been able to cut off forces, and we have cut off individual expenses, and we have stopped work that was going on, and that ought to have been continued, and which was cut off simply because we didn't have the means to carry it on. We are not able today, to make a fair profit, and to make a living, at the same rates that we earned ten years ago. The prices of the commodities that are consumed by the railroads have all advanced; wages have advanced, and there has been a large addition to the plant of the Central Railroad; during the three or four years that ended last November, during which our business was growing constantly, a great deal of money was spent in the purchase of engines and cars, and in the addition of yards and stations. Now, we can stop the engines from running, we can cut off the fuel bill, and we can stop the wages of the engineers and firemen, but we can't stop the interest on the capital invested in all those properties; and we have got to have an increase, not only in those rates that we have already increased, but in all of our rates, if we are to go on and develop the railroads along with the development of the country in other respects.

The Central Railroad is absolutely at its row's end, so far as the financial future of the property is concerned. We have, within the last few weeks, arranged to sell the last that we are holding in the treasury, probably three hundred thousand dollars, to pay expenses that were incurred during the fiscal year that has just closed. We will not have a dollar in the treasury for capital expenditures, and there is no means provided, so far, to refinance the property. All we can do in response to the demands of the people for increased service, increased facilities, and comforts, and safety, has got to be made out of the earnings of the property, until we have got, by increased rates, and increased earnings, a basis for a greater

119 capitalization. We can't borrow money on the basis of our present operations.

Judge HILLYER: Don't your reports show a larger gross operating revenue for June, 1908, than for June, 1907?

Mr. WINBURN: Yes, sir; and that deserves an explanation that I should have overlooked if you hadn't mentioned it. Last year at the end of the fiscal year, we had to provide for this loss that grew out of the decision of the Supreme Court in the lumber case, and after calculating the loss on our business during the five previous years, we figured we would lose $150,000, that we would have to pay back $150,000; that $150,000 was taken out of the June earnings. When the estimated earnings for June this year were sent out, the $150,000 *that* had been taken out of last June, so that while we showed a nominal increase of $75,000 or $80,000, I think, in our earnings this year, we were really $75,000 or $80,000 behind last year. We actually didn't have an increase, but a very large decrease, and if it hadn't been for the very large movement of fruit during that month, it would have been much greater. The movement of fruit during that month was between twelve and fifteen hundred cars, something unheard of in the past, and probably will not occur in the near future.

It is fair to say that during the first week in July, our earnings did show an increase of $21,000; that was a correct comparison with last year, and seems to be a gain. The second week showed an increase of $2,000.

Commissioner CALLOWAY: That is in gross?

Mr. WINBURN: Gross. The third week is not yet out, but the car movement would indicate that we have gone back to a loss again. I haven't yet been able to explain the gain in the two weeks, but it was short, and doesn't give us a great deal of encouragement, I am sorry to say.

Now, the chairman asked this morning, when the commission first assembled, for the railroads to explain why these advances should be made. I have already explained why we need the money. I feel also, and I feel it just as strongly as I do the other side of the question, that the increase in rates will not be burdensome.
120 These rates were reduced in 1905, substantially the amount that they were advanced effective August 1st; in other words, we are only going back to the rates that we had for many years, rates that we had during a period when, I say to you, we were able to operate on a much lower operating ratio basis upon the rates then in effect, than we are now able to operate on. I believe the meat rates were advanced one cent more than they were cut down; to that extent, we have not got a rate higher than it was in 1905.

Now, while a great deal has been said about the amount of revenue involved in this—Rome says she is going to lose ten thousand dollars, I think, and various estimated [estimates] have been made by individual citizens and a number of cities, which, in the aggregate, would amount to a great deal of money, but we find that the increase in the rate on all of the grain, and meat, and flour, and hay, that moves over the Central Railroad into the State of Georgia, and through the State of Georgia into the State of Florida, and into the State of South Carolina, would not amount to exceeding $2500 a

month; and the Central reaches, I guess, more of the cities of the State, more of the larger centers in the State, than any other individual railroad, and operates a greater mileage than any other railroad; so I can't figure, from my record, how any such amount of money is involved in this change in the rates. I think misstatements have been made by the chambers of commerce.

I have some figures which I will be glad to leave with the commission; they are the figures on which I base the statement of the effect on the Central Railroad's revenue, and if they will be of any value, I will be glad to leave them.

Now, just one word about the cost per family, per head and per family. I don't see how that is going to figure out. I haven't made any extensive calculations. I just assume that the people of Rome are not going to eat any more than anybody else; but I don't figure how a family would be affected to the extent of five dollars in these changes. The change in the rates is three cents per hundred pounds; assuming that an able bodied person may eat a pound of meat a day, or three hundred and sixty-five pounds in a year; that isn't quite eleven cents; say that he consumes two barrels of flour, that is eight cents; eleven and eight are nineteen. I can't figure how an individual will have his cost increased twenty-five cents per annum by the change; and on that basis, five people to the family would only amount to about $1.25 a year. Now, the head of the family,
121 if he is a traveling man, and goes a hundred miles over any of these railroads in the State, he saves a half cent a mile; he saves fifty cents; and if he travels two hundred miles, he will save all that his family will lose in the cost of supplies.

Our passenger business has not fallen off like our freight business. I don't know why that is, but the people seem to have money enough to travel on.

Judge HILLYER: Maybe it is the reduction.

Mr. WINBURN: They either have no money to continue their business operations, and their manufacturing enterprises, or they have no confidences in the conditions, and they put their money in an old wool sock. I don't know why that is. The passenger business has not gone down like the freight business; and that is just as true in Alabama, where no change was made, as in Georgia, where a reduction was made.

Commissioner CALLOWAY: I would suggest, at Rome, that ten thousand dollars would not only cover the City of Rome, but would cover perhaps all of the County of Floyd, and other counties that Rome would ship to.

Mr. HARDY: There would unquestionably be more than the two thousand families in Rome. It would cover some families in other counties.

Commissioner CALLOWAY: Rome being a jobbing point, they get their stuff there.

Mr. HARDY: In the meantime, I would like to draw Mr. Winburn's attention to the fact that in his estimate of $1.25, he omitted the item that is largest: that is, hay, grain and feed stuffs.

Mr. WINBURN: I didn't suppose the people of Rome were eating any hay.

Mr. HARDY: They don't; but in my estimate, the grain, hay, and corn and oats covered half the total.

122 Chairman MCLENDON: Is there anybody wishes to say anything on this subject this afternoon? If not, the hour for adjournment having arrived and departed, the session will now close.

Hearing closed.

(Indorsement:) U. S. Circuit Court, Western Division, Southern District of Ga. Macon Grocery Co., *et al.*, *vs.* Atlantic Coast Line R. R. Co., *et al.* Copy of Proceedings Before Georgia R. R. Commission, July 22, 1908. Filed August 6, 1908. Cecil Morgan, Deputy Clerk.

Articles of Association of Southeastern Freight Association.

For the purposes set forth in the following articles the companies subscribing hereto for the Southeastern Freight Association:

I.

SECTION 1. An executive board is hereby created, composed of either the president, vice president, general manager, or other officer of each member of the association, and designated annually by such member; but each officer thus designated may appoint any other officer or agent of his company as proxy, with power to represent him at any meeting of said board.

SECTION 2. The executive board shall elect its own chairman. Said board shall also direct the chairman of the association, and shall fix his term of service and salary. All expenses of the association shall be subject to the review and approval of the executive board, or of a committee to be appointed by said board.

SECTION 3. The executive board shall meet upon the written request of two or more members thereof, or upon the call of its chairman.

SECTION 4. A majority of the members of the executive board, present or represented by proxy, shall constitute a quorum.

123 SECTION 5. It shall require the unanimous action of those present in person or by proxy, to adopt any motion or resolution that may be made before the executive board.

SECTION 6. The executive board shall have the power to reconsider any subject that may have been considered by the conference committee hereinafter provided for.

Article II.

SEC. 1. Each member of the executive board shall appoint a traffic officer of his company, and such traffic officer thus appointed shall

constitute a conference committee. Any traffic officer appointed a member of the conference committee may appoint any other officer or agent of his company as proxy with power to represent him at any meeting of said committee. A majority of the members of the conference committee, present or represented by proxy shall constitute a quorum.

SEC. 2. Any member of this association proposing to make any change in its rates, rules or regulations, will suggest the same to said conference committee for consideration and interchange of views before such change shall take effect, but it is distinctly understood that each member reserves to itself at all times the right to take separate and independent action on each and every subject whether suggested to said conference committee or not.

Article III.

SEC. 1. Upon complaint to the chairman of the association that illegal devices have been resorted to, whether by secret debates [rebates] or draw-backs, or payments of commissions or underbilling weights or otherwise, he shall make an investigation thereof and he or his representative shall be given access to the records of all members of this association, so far as the same may pertain to the traffic with reference to which such complaint may have been made.

Article IV.

SEC. 1. The association expenses shall be apportioned fairly between the members by the executive board, and upon the
124 basis so fixed by the board, the chairman of the association shall have authority to collect the same.

Article V.

SEC. 1. Any member retiring from this association before the expiration of the time herein fixed, except by unanimous consent shall not be released from its obligation to contribute its share of the association expenses, as the same may be fixed by the executive board.

Article VI.

SECTION 1. It shall be the duty of the chairman to preside at all the meetings of the conference committee, to keep the records of the association, to receive from each member of the association copies of tariffs or rates, established by said member; to compile, print and distribute such tariffs or rates in conformity with the Interstate Commerce Act and other laws; to formulate and distribute such statistical information as may be called for by the conference committee, or by the executive board, any expense incurred in collecting such information to be apportioned among the interested members by the chairman of the association. Each member will furnish such reports of freight traffic and other statistical data as may be called for

by the chairman of the association. The chairman shall also receive and list for discussion subjects coming before the conference committee, conduct all correspondence that may be necessary and communicate such information as to the records of the association as may be requested by members and others interested.

Article VII.

SECTION 1. Nothing herein contained shall be so construed as to confer upon a majority or any number of members of this association the power or authority to make rates or tariffs, upon the line of any other member of this association, or to make joint rates or tariffs for any other member. Nothing herein contained shall be so construed as to confer upon the executive board or conference committee, or the chairman of the association, or the chairman of the executive board, or upon any other committee or officer of the association, the power or authority to make rates or tariffs upon the line of
125 any member of this association, or to make joint rates or tariffs for any member of this association; it being distinctly understood that each member of this association expressly reserves to itself the exclusive power to make rates and tariffs on its own line, and to itself the exclusive power to make joint rates and tariffs and its connections, free from the dictation or control of any other member or members.

Article VIII.

SEC. 1. The articles of this association shall relate to the territory lying south of the Potomac river to the Virginia-West Virginia state line, then via said line to Bristol, Tennessee, through and including Middlesboro, Ky., Jellico and Harriman Junction, Penn., to and including Chattanooga, Tenn., and on and south and east of a line from Chattanooga, Tenn., via the Alabama Great Southern Railroad to Birmingham, Alabama, thence via the Southern Railway Company to and including Selma, Ala., thence via the Western Railway of Alabama to and including Montgomery, Ala., thence via the Atlantic Coast Line Railroad to Valdosta, Georgia, Jasper, Live Oak and Lake City, Florida, to Jacksonville, Fla., including points on the line from Montgomery to Jacksonville, thence via the South Atlantic Seaboard to the Potomac river. Said articles shall relate to rail lines and steamship lines which are now or may hereafter become members of this association.

SEC. 2. Said articles shall relate to traffic having origin or destination within the territory above defined, in which two or more members of this association may be interested, except that said articles shall not relate to traffic between any two points north of the Virginia-North Carolina state line; nor to traffic between points on the designated northern and western boundary lines, and points outside the territory as above defined; nor to traffic from or through North Atlantic ports to South Atlantic ports or from South Atlantic ports proper to or through North Atlantic ports, nor to coke or bituminous coal.

Article IX.

SEC. 1. No change shall be made in these articles of association except by consent of each member of the association.

126 Article X.

SEC. 1. These articles of association shall become effective the 13th day of August, 1902, and continue in force until April 30th, 1903.

ATLANTA & WEST POINT R. R.
ATLANTA, KNOXVILLE & NORTHERN RAILWAY CO.
ATLANTIC COAST LINE RAILROAD CO.
ATLANTA, VALDOSTA & WESTERN R'Y CO.,
By GEORGIA SOUTHERN & FLORIDA R'Y CO., *Agent.*
BRUNSWICK & BIRMINGHAM RAILROAD CO.
CENTRAL OF GEORGIA RAILWAY CO.
CHARLESTON & WESTERN CAROLINA RAILWAY CO.
CHESAPEAKE STEAMSHIP CO.
CLYDE LINES.
COLUMBIA, NEWBERRY & LAURENS RAILROAD.
GEORGIA R. R.
GEORGIA, FLORIDA & ALABAMA RAILWAY CO.
GEORGIA SOUTHERN & FLORIDA R'Y CO.
JACKSONVILLE & SOUTHWESTERN RAILROAD CO.
MACON & BIRMINGHAM RAILWAY CO.
MERCHANTS' & MINERS' TRANSPORTATION CO.
NEW YORK & TEXAS STEAMSHIP CO.
NORFOLK & WESTERN RAILWAY COMPANY.
OCEAN STEAMSHIP COMPANY OF SAVANNAH.
OLD DOMINION STEAMSHIP COMPANY.
SEABOARD AIR LINE RAILWAY.
SOUTHERN RAILWAY COMPANY.
VIRGINIA & SOUTHWESTERN RAILWAY CO.
WESTERN & ATLANTIC R. R.
WESTERN RAILWAY OF ALABAMA.
WRIGHTSVILLE & TENNILLE R. R. CO.

127 *Method of Procedure for the Consideration of Subjects by the Conference Committee.*

1. The docket shall be closed ten days before each meeting of the conference committee.

2. Each member enlisting a subject shall state as fully as possible the rates, rules and regulations to be discussed and the basis upon which proposed rates are made. Said rates shall be immediately distributed by the chairman to members as information.

3. Subjects shall be assigned for recommendation to sub-committees, the first member named of said sub-committee chairman thereof, and in the absence of the chairman the successive members present to act as chairman. The sub-committee shall be responsible for the consideration of the subject so far as the conference committee is concerned.

4. Any subject not considered at a meeting shall be stricken from the docket. The chairman of the association shall notify each sub-committee chairman of the subjects stricken because of non-consideration; copies of said list shall be sent to all members.

5. A member proposing to make any change in its rates, rules or regulations between meetings of the conference committee, will suggest the same to other members directly interested, and said members shall file in writing with the chairman of the association a declaration or statement setting forth in detail the rates or rules and the effective date thereof, which said member and its connections proposed to establish, and the chairman will compile and print such rates, rules or regulations, and will furnish all members with a copy thereof, and also with a copy of said declaration or statement, and will docket the matter for discussion and consideration at the next meeting of the conference committee.

6. All matters subject for discussion by members of the conference committee, shall be considered at all regular meetings of said conference committee, and not by correspondence with the chairman's office.

This rule shall not be construed as restricting the right of any member to take action in accordance with rule five, or of Section 2, of Article II, of Articles of Association.

128 7. The chairman shall have printed and distributed the meetings of the minutes of the conference committee; said minutes shall be record of final action of general committees and sub-committees.

8. Immediately after each meeting the chairman shall make a compilation of the charges separately made by any member in its rates, rules and regulations as contained in the statements or declarations that have been filed with him by the traffic representative

of any member, and refer as his authority to said written statement or declaration. Each subject shall be numbered. The chairman shall have said compilation printed and promptly distributed as information to members and others interested.

9. The following order of procedure shall govern regular meetings:

First. Chairman's reports.

Second. Subjects listed for general discussion.

Third. Sub-committee work.

Fourth. Final discussion of sub-committee recommendations.

Rules of Procedure for the Discussion and Consideration of Subjects at Joint Conventions of the Representatives of the Southeastern, Mississippi Valley and Southeastern Freight Associations.

That the joint sessions be held every other month (beginning with the month of November), with the third Tuesday.

That the first order of business of joint conference be the selection of the next place of meeting, to be determined by a two-thirds vote of those present. And in the event of a failure to agree, if the meeting at which such failure to agree occurs is held in the territory of S. E. M. V. Association, the next meeting shall be held in Atlanta, Georgia, and if the meeting at which such failure to agree occurs is held in the territory of the S. E. F. Association, the next meeting be held in Louisville, Kentucky.

Special joint sessions of the two organizations shall be called by the respective chairmen, upon the written request of three
129 members of each association, the place of meeting to be a matter of agreement between said chairmen.

Method Under Which Inter-Territorial Subjects Shall be Docketed.

I. Without interfering with the function of either association, as now organized, and merely as a method of procedure, in connection with the docketing of subjects for joint meetings, "Inter-Territorial Subjects" are defined as:

a. Those relating to rates, rules and regulations, applying from or through the territory of one association into or through the territory of the other association.

b. Those relating to rates, rules and regulations applying between points located on the waters of the two associations.

c. Those relating to rates, rules or regulations applying from to or through the territory of one association which affect rates, rules or regulations applying from, to or through the territory of the other association, when suggested for consideration by a line in the territory so affected.

II. (*a*) A line desiring to have considered at a joint meeting any change, addition or amendment to such rates, rules or regulations, will so advise the chairman of the association to which it belongs, and will, so far as practicable, advise said chairman of the rates, rules and regulations, to be suggested and the reasons therefor if unable to give this information, immediately it will communicate same to said chairman in advance of the next joint meeting if practicable.

(*b*) Said chairman will docket the subject under the rules of the association of which he is chairman, exactly as though it was a question of rates, rules or regulations, as applying between points within the territory of said association, and furnish copies of docket advices to the other chairman and members of both associations.

(*c*) Upon receipt of a docket advice as provided for in Section *b*, the chairman of the association receiving it will proceed in
130 the same manner as if the subject had been listed by a member of the association of which he is chairman.

III. Dockets for joint meetings will be prepared by the chairman of the Southeastern Freight Association, which shall brief all matters to be considered, and also indicate the subject numbers as they appear in the records of each association, such docket shall be sent to all the members of both associations, and to the chairman of the Southeastern, Mississippi Valley Association, 8 days prior to the joint meetings.

IV. Records of joint meetings shall be kept by the secretary of the two associations. Such records shall be compared after each joint meeting, and be incorporated in the permanent records of each association.

Amendment to Method under which Inter-Territorial Subjects Shall be Docketed, Adopted to be Tried as an Experiment at Third Joint Convention in March, 1903, and Joint Convention in May, 1903; Necessary Changes and Corrections, if Any, to be Made at the Fourth Joint Convention, in May, 1903.

(*a*) To facilitate the handling of work at joint conventions the following standing committees shall be appointed annually at the January Joint Convention:

1. Committee on Relations with Carolina Lines, Trunk Lines and Water Lines; 11 members.
2. Committee on Relations with Eastern and Western Lines; 11 members.
3. Rules and Regulations Committee; 10 members.
4. General Rates Committee; 11 members.
5. Committee on Forest and Mine Products, Lime, Cement, Brick, Sand, Stone and Furniture.
6. Committee on Grain and Grain Products, Live Stock and Products, Cotton-Seed and Products.

131 7. Committee on Textile Fabrics, Fruits and Vegetables, Fertilizers and Fertilizer Material.

(*b*) All subjects booked for consideration at joint conventions shall be referred to the several committees above named, except questions for general discussion.

(*c*) The dockets for joint conventions prepared by the chairman of the Southeastern Freight Association shall show the standing committees to which the different subjects will be referred, and shall also show the subjects intended for general discussion.

(*d*) The standing committees above enumerated shall be composed of individuals and not of lines.

(*e*) The files of the chairman pertaining to different subjects referred to the standing committees, shall be available for the use of such committees.

(*f*) Each standing committee shall select its own chairman from among its members, and a secretary for each standing committee shall be appointed by the chairman of the two associations.

(*g*) The representative of any line, not a member of any particular standing committee, shall be privileged to attend the meetings of such committee, for the purpose of participating in the discussion of any subject in which he may be interested.

(*h*) The chairman of each standing committee shall announce when the meeting of his committee shall be held, and the individual members of such committee will be expected to attend without further announcement. A majority of the members of each standing committee will constitute a quorum thereof, and the absence of any member shall not prevent consideration of any subject, except by consent of the committee itself.

(*i*) A majority of members present at regularly constituted meetings of the standing committees can submit a recommendation to the joint convention and objections to such recommendation, if any, must be made during sessions of the joint convention.

132 (NOTE.)—The following committees are suggested:

Committee No. 1—
Southern R'y,
Seaboard Air Line R'y,
Atlantic Coast Line R. R.,
Norfolk & Western R'y,
Clyde Line,
Old Dominion Steamship Company,
Ocean Steamship Co.,
Nashville, Chattanooga & St. Louis R'y,
Cincinnati, New Orleans & Texas Pacific R'y,
Louisville & Nashville R. R.,
Illinois Central.

Committee No. 2—
Cincinnati, New Orleans & Texas Pacific R'y,
Illinois Central R. R.,
Louisville & Nashville R. R.,
Mobile & Ohio R. R.,
Southern R'y,
Frisco System,
New Orleans & Northeastern R. R.,
Central of Georgia R'y,
Seaboard Air Line R'y,
Nashville, Chattanooga & St. Louis R'y,
Atlantic Coast Line R. R.

Committee No. 3—
Southern R'y,
Central of Georgia R'y,
Seaboard Air Line R'y,
Atlantic Coast Line R'y,
Merchants & Miners Transportation Co.,
Illinois Central R. R.,
Frisco System,
Cincinnati, New Orleans & Texas Pacific R'y,
Nashville, Chattanooga & St. Louis R'y,
Louisville & Nashville R. R.

Committee No. 4—
Southern R'y,
Central of Georgia R'y,
Seaboard Air Line R'y,
Atlantic Coast Line R. R.,
133 Old Dominion Steamship Co.,
Illinois Central R. R.,
Mobile & Ohio R. R.,
Cincinnati, New Orleans & Texas Pacific R'y,
Nashville, Chattanooga & St. Louis R'y,
Louisville & Nashville R. R.,
Merchants & Miners Transportation Co.

Committee No. 5—
Louisville & Nashville R. R.,
Southern R'y,
Seaboard Air Line R'y,
Atlantic Coast Line R. R.,
Central of Georgia R'y,
Nashville, Chattanooga & St. Louis R'y,
Georgia R. R.,
Illinois Central R. R.,
Georgia Southern & Florida R'y,
Mobile & Ohio R. R.

Committee No. 6—
Southern R'y,
Mobile & Ohio R. R.,

Cincinnati, New Orleans & Tex. Pacific R'y,
Louisville & Nashville R. R.,
Illinois Central R. R.,
Nashville, Chattanooga & St. Louis R'y,
Seaboard Air Line,
Atlantic Coast Line R. R.,
Central of Georgia R'y,
Georgia R. R.

Committee No. 7—
Western Railway of Alabama.
Atlantic Coast Line R. R.,
Seaboard Air Line R'y,
Central of Georgia R'y,
Georgia Southern & Florida R'y,
Southern R'y,
Nashville, Chattanooga & St. Louis R'y,
Mobile & Ohio R. R.,
Illinois Central R. R.,
Louisville & Nashville R. R.

(See table marked p. 134.)

SOUTHERN RAILWAY COMPANY.

ALL LINES.

COMPARATIVE STATEMENT OF ESTIMATED OPERATING REVENUE.

Mileage.	7,296.59	7,256.68				7,237.97		7,196.92		7,196.82	
Week ended July 14, 1908.	1908, † estimated	1907, † actual.	Increase.	Decrease.	Per cent.	1906, actual.	Per cent. of increase or decrease compared with 1908.	1905, actual.	Per cent. of increase or decrease compared with 1908.	1904, actual.	Per cent. of increase or decrease compared with 1908.
Passenger	$239,274.00	$296,486.00		$57,212.00	19.29	$281,418.00	D 14.98	$253,643.00	D 5.44	$233,293.00	2.52
Freight	609,921.00	686,206.00		76,285.00	11.12	642,085.00	D 5.17	601,570.00	1.39	540,275.00	12.89
Mail	26,145.00	31,221.00		5,076.00	16.26	35,947.00	D 27.27	35,808.00	D 26.99	34,083.00	D 23.29
Express	29,351.00	28,226.00	$1,125.00		3.98	27,781.00	5.65	21,410.00	37.09	22,919.00	28.06
Miscellaneous	20,884.00	22,350.00		1,466.00	6.56	16,897.00	23.60	15,255.00	36.90	13,867.00	55.60
Total	$925,575.00	$1,064,489.00		$138,914.00	13.05	$1,004,128.00	D 7.82	$927,086.00	D 0.16	$844,537.00	9.60
*Daily Average	$146,746.00	$166,741.00				$158,734.00		$146,782.00		$133,512.00	
Two Weeks Ended July 14, 1908.											
Passenger	$516,284.00	$626,315.00		$110,931.00	17.57	$586,655.00	D 12.00	$528,315.00	D 2.28	$489,546.00	5.46
Freight	1,155,689.00	1,266,639.00		110,950.00	8.76	1,165,513.00	D 0.84	1,105,567.00	4.53	1,016,434.00	13.70
Mail	55,496.00	62,442.00		6,946.00	11.12	71,894.00	D 22.81	71,616.00	D 22.51	68,166.00	D 18.59
Express	58,702.00	56,452.00	$2,250.00		3.98	55,562.00	5.65	42,820.00	37.09	45,838.00	28.06
Miscellaneous	37,257.00	44,700.00		7,443.00	16.65	33,794.00	10.25	30,510.00	22.11	27,734.00	34.34
Total	$1,823,428.00	$2,056,548.00		$233,120.00	11.34	$1,913,418.00	D 4.70	$1,778,828.00	2.51	$1,647,718.00	10.66
July 1, 190.., to	Actual to ....190..										
Passenger											
Freight											
Mail											
Express											
Miscellaneous											
Total											

"D" denotes decrease.
Nashville Division excluded.
† Does not include outside operations.
NOTE.—This week last year includes $19,220.00 passenger earnings account of the Jamestown Exposition.
*Based on { Freight—Working days, excluding Sunday. Passenger—Entire week, including Sunday.
Washington, D. C. July 20, 1908.

A. H. PLANT, *Comptroller.*

[Indorsement:] U. S. Circuit Court, Western Division, Southern District of Georgia. Macon Grocery Co., *et al.*, *vs.* Atlantic Coast Line Railway Company, *et al.* Comparative Statement of Estimated Operating Revenue of Southern Railway Co. Cecil Morgan, Deputy Clerk.

PAGE BOUND

Including: Bank and Quotation Section (Monthly); Railway and Industrial Section (Quarterly); State and City Section (Semi-Annually); Electric Railway Section (Three Times Yearly).

Vol. 87. Saturday, July 25, 1908. No. 2248.

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Published Weekly.

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ATLANTIC COAST LINE RAILROAD CO. ET AL.
99

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Clearing-House Returns.

The following table, made up by Telegraph, &c., indicates that the total bank clearings of all clearing houses of the U. S. for week end July 25 have been $2,501,651,554, against $2,531,789,631 last week and $2,554,412,863 same week last year.

Clearings by Teleg'h—Week end July 5.	1908.	1907.	%
New York	$1,261,776,820	$1,228,037,193	+2.7
Boston	111,404,539	122,606,993	—9.1
Philadelphia	89,328,846	113,327,636	—21.2
Baltimore	19,435,878	22,159,904	—12.3
Chicago	182,939,523	195,629,462	—6.5
St. Louis	45,362,714	47,998,003	—5.5
New Orleans	9,980,667	10,813,566	—7.7

PAGE BOUND

VERTICAL IN BOOK

137	Seven cities, 5 days	$1,719,528,987	$1,740,572,757	—1.2
	Other cities, 5 days	362,014,273	365,974,816	—1.1
	Total all cities, 5 days	$2,081,543,260	$2,106,547,573	—1.2
	All cities, 1 day	420,108,294	447,865,290	—6.2
	Total all cities for week	$2,501,651,554	$2,554,412,863	—2.1

The full details for the week covered by the above will be given next Saturday. We cannot furnish them today, clearings being made up by the clearing houses at noon on Saturday, and hence in the above the last day of the week has to be in all cases estimated, as we go to press Friday night.

We present below detailed figures for the week ending with Saturday noon July 18, for four years:

Clearings at—	Week Ending July 18. 1908.	1907.	Inc. or Dec.	1906.	1905.
	$	$	%	$	$
New York	1,481,047,029	1,611,773,636	—8.1	1,620,418,222	1,439,283,238
Philadelphia	117,769,591	141,539,989	—16.8	148,987,044	125,130,680
Pittsburg	38,102,586	51,802,927	—26.4	50,744,499	49,007,890
Baltimore	25,390,211	26,990,348	—6.0	26,209,644	23,766,924
Buffalo	7,998,663	8,490,847	—5.8	8,331,660	6,659,750
Washington	5,583,998	6,258,343	—10.8	5,231,142	5,028,270
Albany	5,642,467	5,783,401	—2.4	5,108,258	4,167,582
Rochester	3,076,868	3,174,162	—3.1	3,244,168	3,291,923
Scranton	2,148,732	2,354,779	—8.7	2,128,106	1,864,321

138 Syracuse	1,972,844	2,492,132	—20.9	1,962,483	1,526,146
Wilmington	1,433,337	1,355,588	+5.8	1,240,165	1,168,119
Reading	1,271,386	1,321,055	—3.8	1,182,574	1,013,024
Wilkes Barre	1,069,776	1,181,031	—9.4	1,005,522	937,610
Wheeling	1,602,870	971,967	+6.5	1,001,690	735,321
Harrisburg	1,267,302	1,006,925	+25.8	913,126	.....
Erie	611,367	746,397	—18.1	702,241	545,138
Chester	674,484	510,862	+32.0	609,057	485,257
Greesburg	457,113	419,027	+9.1	589,680	555,269
Binghamton	518,600	546,900	—5.2	516,300	474,100
Franklin	679,830	274,831	+147.4	278,119	246,062
York	875,462	838,638	+4.4	.....	.....
Trenton	1,539,962	Not included	in total		
Altoona	516,016	Not included	in total		
Total Middle	1,699,194,516	1,869,834,785	—9.1	1,880,403,700	1,665,886,624
Boston	159,849,776	165,958,296	—3.7	158,159,903	142,531,487
Providence	6,698,400	7,913,100	—15.4	7,101,100	7,250,800
Hartford	4,151,109	3,904,838	+6.1	3,959,923	2,968,496
New Haven	3,208,918	2,725,276	+17.7	2,620,441	2,339,828
Springfield	1,900,000	2,145,016	—11.4	1,853,323	1,638,497
Portland	1,796,122	1,844,601	—2.6	1,711,382	1,506,269
Worcester	1,734,07–	1,732,716	+0.1	1,526,654	1,561,425
Fall River	992,300	907,548	+9.3	804,156	676,059
New Bedford	1,078,015	735,458	+46.6	721,517	524,068

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139	Lowell	500,000	688,327	—27.4	514,857	479,937
	Holyoke	463,586	411,404	+12.7	450,144	376,362
	Total New England	182,382,033	188,966,580	—3.5	179,423,400	161,853,228
	Chicago	238,387,714	237,708,835	+0.3	217,645,170	189,042,456
	Cincinnati	27,011,400	28,568,600	—5.4	25,523,850	23,961,550
	Cleveland	15,933,592	19,384,846	—17.8	17,660,467	15,497,384
	Detroit	13,009,354	15,484,713	—16.0	12,998,449	10,989,398
	Milwaukee	10,243,569	10,973,657	—6.7	8,809,157	8,481,655
	Indianapolis	9,026,363	8,599,318	+5.0	7,843,101	6,444,503
	Columbus	5,100,000	5,790,700	—12.0	4,863,700	4,398,100
	Toledo	3,796,649	4,169,788	—4.6	3,898,980	3,279,447
	Peoria	2,023,199	2,556,177	—20.9	2,509,709	2,656,136
	Grand Rapids	2,058,354	2,484,293	—17.1	2,195,753	1,951,149
	Dayton	1,739,810	2,221,045	—21.7	1,883,120	1,603,372
	Evansville	2,440,624	2,269,468	+7.5	1,764,124	1,470,087
	Kalamazoo	1,077,492	1,120,534	—3.8	893,770	729,948
	Springfield, Ill.	805,266	751,718	+7.1	827,231	710,803
	Fort Wayne	910,225	780,278	+16.7	778,611	899,851
	Akron	700,000	825,000	—15.1	666,768	521,700
	Rockford	747,626	650,875	+14.9	610,392	493,430
	Lexington	566,834	646,591	—12.4	588,534	562,692
	Youngstown	682,960	1,024,960	—33.3	561,397	414,488
	Canton	400,000	520,047	—23.1	488,979	392,151
	South Bend	500,000	501,834	—0.4	430,506	348,009

140 Springfield, O.	388,182	383,102	+1.3	398,107	383,787
Mansfield	321,474	394,927	—18.6	328,845	371,928
Quincy	456,232	366,627	+24.4	315,811	383,674
Bloomington	457,916	359,501	+27.4	307,511	312,154
Decatur	447,683	356,134	+25.7	375,338	295,602
Jackson	250,000	413,596	—15.4	247,500	225,000
Jacksonville, Ill.	232,158	269,168	—13.8	280,872	280,223
Ann Arbor	152,513	142,134	+7.3	120,548	100,232
Adrian	16,911	30,000	—43.6	.....	.....
Danville	360,198	Not included	in total		
Total Middle West	340,164,100	349,748,466	—2.7	315,816,300	277,200,909
San Francisco	36,216,011	42,979,631	—15.7	40,630,759	25,929,380
Los Angeles	10,955,968	11,315,924	—3.2	10,252,230	6,081,450
Seattle	9,855,437	9,692,681	+1.7	9,000,000	3,977,813
Portland	6,218,180	7,668,714	—18.9	5,000,000	3,133,346
Salt Lake City	5,243,832	7,789,835	—32.7	4,928,110	3,457,411
Spokane	6,246,063	5,777,935	+8.1	3,748,535	2,256,868
Tacoma	4,305,079	5,056,639	—14.8	3,738,183	1,894,243
Oakland	1,536,151	2,562,935	—40.0	4,043,894	.....
Helena	951,435	1,298,869	—26.7	936,495	794,833
Fargo	543,990	448,392	+21.3	429,722	397,956
San Jose	415,666	459,499	—9.5	400,000	.....
Sioux Falls	460,000	515,000	—10.7	342,196	181,895
Sacramento	853,000	Not included	in total		

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141	Stockton	555,000	Not included	in total		
	San Diego	742,000	Not included	in total		
	Fresno	463,000	Not included	in total		
	North Yakima	210,885	Not included	in total		
	Billings	185,805	Not included	in total		
	Total Pacific	82,947,812	95,566,054	—13.2	80,406,230	48,105,195
	Kansas City	32,941,488	30,318,693	+8.6	26,166,254	23,729,341
	Minneapolis	15,919,540	20,898,482	—23.8	16,369,584	15,003,138
	Omaha	10,553,536	9,826,510	+7.4	9,395,181	9,034,242
	St. Paul	8,101,341	9,203,713	—12.0	8,303,174	6,429,287
	Denver	8,259,516	8,261,990	—0.03	5,631,142	6,401,199
	St. Joseph	4,407,998	5,473,706	—19.5	4,359,803	4,236,797
	Des Moines	2,415,016	2,768,224	—12.7	2,441,877	2,499,723
	Sioux City	1,922,496	1,978,592	—2.8	1,761,132	1,637,124
	Lincoln	1,226,634	990,713	+23.8	1,422,652	.....
	Wichita	1,260,334	1,287,525	—2.1	1,214,055	1,168,801
	Colorado Springs	709,986	716,742	—0.9	937,576	784,711
	Davenport	901,714	766,820	+17.5	795,830	610,341
	Topeka	1,037,339	989,055	+4.9	909,159	454,476
	Pueblo	517,126	576,626	—10.3	510,162	473,555
	Cedar Rapids	866,453	606,559	+42.9	409,251	385,195
	Fremont	239,038	218,768	+9.3	258,731	226,670
	Tot. oth. West	91,279,555	94,882,718	—3.8	80,876,563	73,074,600

142 St. Louis	59,671,037	60,734,222	—1.7	54,648,421	53,218,897
New Orleans	12,279,822	14,986,810	—18.1	14,584,927	17,142,727
Louisville	11,901,208	12,269,703	—3.0	11,841,051	10,082,366
Houston	7,993,705	11,612,846	—31.2	8,425,019	6,000,000
Galveston	5,500,900	5,090,500	+8.0	4,810,000	5,968,500
Richmond	5,894,468	6,117,293	—3.6	5,450,481	5,272,648
Atlanta	3,506,458	4,076,332	—14.0	3,674,866	2,640,111
Memphis	3,664,491	4,268,975	—14.1	3,578,713	3,911,137
Nashville	3,100,000	3,959,552	—21.7	3,397,985	2,809,315
Fort Worth	4,600,000	3,772,233	+21.9	2,599,786	2,109,098
Savannah	2,584,767	2,942,520	—12.2	3,740,551	4,566,230
Norfolk	2,089,862	2,595,640	—19.5	2,361,713	1,906,825
Jacksonville	1,426,386	1,600,925	—10.9	1,329,177	1,001,790
Birmingham	1,535,461	1,991,964	—22.9	1,600,000	1,480,000
Mobile	1,620,043	1,479,651	+9.5	1,622,681	1,072,236
Knoxville	1,400,000	1,532,958	—8.7	1,247,036	1,274,739
Chattanooga	1,263,511	1,426,558	—11.4	1,427,689	885,596
Augusta	867,863	1,372,558	—36.8	1,222,897	1,752,221
Charleston	1,201,613	1,250,000	—3.9	1,150,641	1,259,486
Little Rock	1,215,099	1,206,723	+0.7	1,184,781	886,095
Macon	507,169	584,483	—13.2	399,855	463,458
Beaumont	510,591	467,043	+9.3	418,959	369,954
Oklahoma	943,061	994,065	—5.1	700,000	.....
Columbus, Ga.	245,000	250,000	—2.0	260,000	240,000
Wilmington, N. C.	300,000	400,000	—33.3	430,000	.....
Austin	383,389	Not included	in total		

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Stocks—Highest and lowest sale prices.						Sales of the week.		Range since Jan. 1, 1908, on basis of 100 shares lots.				Range of previous year 1907.	
Saturday, July 18.	Monday, July 20.	Tuesday, July 21.	Wednesday, July 22.	Thursday, July 23.	Friday, July 24.	Shares.		Lowest.		Highest.		Lowest.	Highest.
92 - 92½	92 - 93	92¾- 96	94 11/22- 94⅞	94½- 95¾	94 - 95	4,035	Atlantic Coast Line R. R.	59½	Mch. 2	96	July 21	58 Nov.	133¾ Jan.
109 -109½	107⅞-108¼	107½-109¾	108 -110	109¾-111¼	108½-110	12,000	Louisville & Nashville.	87¼	Feb. 19	113	May 19	85½ Nov.	145¼ Jan.
17½- 18	18 - 19	18⅝- 19½	18⅝- 19⅛	19 - 19½	18⅜- 18¾	38,000	Southern v tr cfs Stamped.	9⅛	Jan. 10	19½	May 19	10 Nov.	34 Jan.
46 - 46½	46½- 49½	49 - 50½	49½- 50¼	49¾- 50⅜	48¼- 4 9	10,075	Southern pref.	25½	Mch. 5	50½	July 21	29½ Nov.	94½ Jan.

(The above stock quotations are extracted from "The Commercial & Financial Chronicle," published in New York City, July 25, 1908, page 207.)

Filed August 6, 1908.

CECIL MORGAN,
Deputy Clerk.

143	Vicksburg	264,348	Not included	in total		
	Total Southern	135,821,615	146,988,554	—7.6	132,107,230	126,313,449
	Total all	2,531,789,631	2,745,987,157	—7.8	2,668,024,423	2,372,777,320
Outside New York		1,050,742,602	1,134,213,521	—7.4	1,047,615,201	933,514,082

Filed August 6, 1908.
CECIL MORGAN,
Deputy Clerk.

(See table marked p. 144.)

145 *Bill for Injunction and Relief.*

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia, at Mount Airy, Georgia.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Opinion Sustaining Demurrers to Pleas to Jurisdiction. (July 29th, 1908.)

SPEER, *Judge* (orally):

This [is] an exceedingly interesting question, and upon its proper and final determination, a great deal looking toward the settlement of controversies between the shipping public and great lines of transportation must depend. The averments of the bill are of the most significant character. It is charged that through a great freight association, called the Southeastern Freight Association, the respondent corporations have entered into an unlawful combination in restraint of the business of transportation by means of which the staple commodities, upon which the very life of the people must depend, are necessarily and largely enhanced in price. It is alleged that this is done in an unlawful manner; that the increase is to go into effect immediately; that the damage to innumerable purchasers of goods throughout the territory affected will be irreparable; that the complainants and all in like cases standing have no recourse, save by application to the Court of Equity having jurisdiction.

It is true that in this case the illegality of the alleged increase in rates must necessarily in large measure be determined by the Federal law. The legality or illegality of the alleged combination in restraint of trade must be determined by the same law, and it seems to be conceded that, generally speaking, this Court would not have jurisdiction of these questions finally except under conditions which do not exist here. That is to say, the Court can only for final determination entertain the Federal question in the district of which the defendants are inhabitants. But to my mind this case presents this aspect; if the averments of the bill are taken as true. Here is a threatened and immediate violation of the Federal law of the gravest character to a large number of people, not to the public, but to many.

146 The injuries, the consequences of which are described, will take effect on the first of August. There is no time, this being the 29th of July, for these people to have protection, or seek recourse elsewhere. They are entitled to relief if the averments are true. *"Ibi jus ibi remedium."* Wherever there is a wrong there is a remedy. Now, if this increase of rates is unlawful, as it is alleged to be, if in point of fact these people who bring this complaint are to be made to suffer irreparable injury by the action of the respondents they ought to have the right somewhere before some tribunal under our system to protect themselves from the wrong and

the injury. That it is irreparable, if the charges of the bill are true, there can be no doubt. An illustration in point is the Tift "lumber rate case." There was a case where similar charges, arbitrary and unreasonable, it was alleged, were imposed upon the shippers. The decree was granted upon the fullest consideration. It was determined by all the courts having jurisdiction, and by the Interstate Commerce Commission that those rates were arbitrary and illegal. It was affirmed by the Supreme Court of the United States. The railroads, through their distinguished representatives, had in open Court promised to pay back to the shippers the amount thus exacted, in case this Court would withhold the injunction, and the case should finally be determined against them. And yet, now we see the shippers are driven to multitudinous proceedings in other cases, and delayed year after year until their substantial rights will apparently be frittered away by the cost of litigation. This is a grave wrong to the shippers. What would be the condition of these shippers before the Court, if their charges are true here, if these increased rates should be imposed by the railroad companies?

They must pay the exaction, however unlawful. They may then go to the Interstate Commerce Commission, then to the Circuit Court, perhaps thence to the Circuit Court of Appeals, and thence to the Supreme Court of the United States, with all that laws delay which is classed by Shakespeare with "the proud man's contumely, the insolence of office, the pangs of despised love, and all the spurns which patient merit of the unworthy takes." In the meantime the combination of railroads would have the use of money thus unlawfully exacted from the people. All of this these merchants would endure and in this southern country, which is little able to bear it. Why? Because no court has been found which can stay the wrong and prevent these calamities to the people because there is no jurisdiction in any court created by the people which can avoid
147 these calamitous results. I do not believe that such is the condition of our law. I think that in view of the general policy of the laws of the United States on this great subject, with which our people are grappling, and a wrong which they are attempting to redress—all, I think, in a spirit of fairness and justness to the great lines of railway transportation, a spirit which I am sure inspires the breast of this Court—there is such a tribunal and such a remedy. I think that we have jurisdiction over these railroads, which come into the Southern District of Georgia, and carry on their business here. They are found here. They remove their cases to these courts, they sue others here, both in law and in equity, they do this on rate cases, as in cases of the recent suits before Judge Pritchard in North Carolina and Judge Jones in Alabama, on account of their non-residence when parties sue them. But they deny the jurisdiction when its efficacious remedies are sought against them. It is the district or the complainants' residence, and the defendants having been found in that district, may be there sued. They cannot plead that they are non-residents for the purpose of the litigation here, and yet come into this territory and control the price of every thing upon which the comfort and the very life of the people depend

so far as the transportation is concerned, and then deny the right of those wrongs to be heard. I think that the averments of the bill demand additional inquiry.

I will say now, to counsel, that if the facts of the case are proved as they insist they will be, so far as the Court is at present advised it will proceed to retain this bill for injunction until they can make proper application to the Interstate Commerce Commission, and there have the question determined as to whether or not this increase is reasonable. The railroads will then have no reason for delay. They will "post with quick dexterity" for final judgment. The Court will not, as at present advised, proceed to final decree in this case, at least until that trained expert and responsible body, charged with the special duty, shall pass upon the issue here. * * * I will sustain the demurrer to the plea and thus intimate that if complainants do not in a reasonable time go to that department of the Government especially charged, the Court will dispose of the case. I sustain the demurrers and overrule the pleas to the jurisdiction, construing the pleas and the averments of the demurrers and the bill together.

[Indorsement:] No. 590. U. S. Circuit Court, Western
148 Division, Southern District of Georgia. Macon Grocery Company, *et al., vs.* Atlantic Coast Line Railroad Co., *et al.* Opinion of the Court Sustaining Demurrers to Pleas to Jurisdiction. Filed August 1, 1908. Cecil Morgan, Deputy Clerk.

Opinion.

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia, at Mount Airy, Georgia. In Equity.

MACON GROCERY COMPANY ET AL.

vs.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Bill for Injunction, etc.

W. A. Wimbish, Edgar S. Watkins and Alexander Akerman, for the Complainants;

Henry L. Stone and Ed Baxter, for Louisville & Nashville R. R. Co.;

Claudian B. Northrop and Sanders McDaniel for Southern R'y. Co., and Cincinnati, New Orleans and Texas Pacific R. Co.;

George B. Elliott and Robert C. Alston, for Atlantic Coast Line R. Co.;

Claude Waller, J. D. B. DeBow and John L. Tye, for Nashville, Chattanooga & St. Louis R'y. Co., and

Ed Baxter and Sydney F. Andrews, Special Counsel for all of the Respondents.

Statement of the Case.

The complainants are wholesale dealers in groceries, feed products and like commodities in several towns and cities within the territorial jurisdiction of this Court. The respondents are certain railway companies organized and existing under the laws of States other than Georgia, but whose lines extend the State and into the division and district of this jurisdiction. The respondents are common carriers engaged in interstate commerce. They transport grain, flour, grain products, hay, meats, corn and many other staple commodities from Ohio and Mississippi River crossings, from Nashville, Ten-
149 nessee, and other points made with relation thereto to what are termed southeastern points of destination. The latter expression includes all points of delivery within the States of South Carolina, Georgia, Florida and a large part of Alabama. The respondents, it is charged, are members of what is termed "The Southeastern Freight Association," and this organization constitutes an illegal combination in restraint of interstate trade for the promotion of monopoly and for the destruction of fair competition among carriers engaged in that trade. The respondent railway companies, it is alleged, by concurrence of action, and through the medium of this Southeastern Freight Association can and do fix and maintain rates for transportation of freight from Ohio and Mississippi River crossings, to destinations in the States of Georgia, Florida and South Carolina. One of the respondents, the Louisville & Nashville Railway Company, has continuous lines from Cincinnati, Louisville, Evansville, St. Louis, Memphis and Nashville, to Atlanta. As one of the lessees of the Georgia Railroad, this respondent has entrance into Athens, Macon and Augusta. The Nashville, Chattanooga & St. Louis Railway maintains and operates a through line from the Ohio River at Paducah, Kentucky, and from the Mississippi River at Hickman, in the same State, and at Memphis, via Nashville to Atlanta. Another respondent, the Atlantic Coast Line Railroad Company, is also a lessee of the Georgia Railroad and has direct connection with the Louisville & Nashville, and the Nashville, Chattanooga & St. Louis. Over its own lines of railway, it reaches many important destinations in South Georgia and Florida. Another respondent, the Southern Railway, in connection with the Cincinnati, New Orleans & Texas Pacific Railway, maintains and operates through lines from Cincinnati, Louisville & St. Louis to Atlanta, Macon, Columbus and other important points within the State of Georgia. The Nashville, Chattanooga & St. Louis Railway Company is owned or controlled by the Louisville & Nashville Railroad Company, through the ownership of a majority of its capital stock. The Atlantic Coast Line Company, a holding company, organized under the laws of the State of Connecticut, owns or controls both the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company.

The Cincinnati, New Orleans & Texas Pacific Railway Company is owned or controlled by the Southern Railway Company, through

the ownership of stock or otherwise, and is practically a part
150 of the Southern Railway system. The lines of the companies enumerated are all, by virtue of their location, naturally competitive. There is no other railway system of its own lines extending from Ohio and Mississippi River crossings, from Nashville, Tennessee, and points made with relation thereto, to destinations in the States of Georgia, Florida and South Carolina. Because of the advantages afforded by their continuous and controlled lines, the Southern Railway system and the Atlantic Coast Line system can and do fix and maintain the rates between Nashville, Ohio and Mississippi River crossings, and relative points to all points of destination in the Southeastern territory mentioned. It is charged that any combination, agreement or understanding between these naturally competitive lines whereby rates are advanced and maintained is in suppression of competition.

In the year 1904, and prior thereto, there was much discontent with the rates of freight from eastern and western points of origin to Atlanta and other relative points, including many cities of middle and Southern Georgia. Shippers and interested parties sought of the carriers a reduction of rates, and as a result a citizens committee was appointed by the City Council of Atlanta to confer with a committee of traffic officials of railway lines, initial at that city. The whole body of rates from eastern and western points of origin was discussed and a general readjustment resulted from conferences in November and December, 1904. The following reductions from Ohio and Mississippi river crossings to Atlanta were voluntarily accorded by the railroads:

Class B, 2 cents per hundred pounds; Class C, 2 cents; Class D, 2 cents; Class F, 4 cents; flour in sacks, 2 cents; fresh meats, C. L.

Similar reductions were also made to Macon, Columbus and other points relative in rates to Atlanta. It was agreed between the traffic officials of the railroad companies and the citizens committee that the reduced rates were just, reasonable and compensatory. The companies then prepared and issued, effective February 1st, 1905, their freight tariff incorporating these reduced rates in which it is charged each of the respondents to the bill joined and conferred. These reduced rates thus put into effect have since been maintained under them a large and growing traffic has moved, and they were satisfactory to the shippers and remunerative to the carriers. During the years in which they have been maintained, business and trade conditions became adjusted to the present rates and all parties interested have prospered thereunder.

151 Some time prior to the first of June, 1908, certain of these carriers began a concertive movement for an increase in the rates established as described. It was essential for the two great controlling systems to unite in the proposed increase. In order to accomplish this the intervention of the Southeastern Freight Association was sought and employed. As a result the Louisville & Nashville, the Atlantic Coast Line, and the Southern Railway, composing the two naturally competing systems, joined in a declaration. This they filed with the Southeastern Freight Association. It declared

that on August 1, 1908, they would make effective an advance in rates on fresh meats, grain products, hay, and packing house products, from the producing points above mentioned to Southeastern points. These commodities are classified by the Interstate Commerce Commission as B, C, D and F. In Class B are salt meats in bulk, ham, shoulders, sides, pigs' feet, beef, pork, tripe, sausages, canned meats, fish, lard substitutes or compounds, cooking oils, products of cotton seed oil or cocoanut oil, and other related articles. On all products of this class the respondents propose an increase in the charges of transportation of 3 cents per one hundred pounds. Class C imports flour, if not otherwise specified, in sacks. On the actual weight of this commodity the carriers notify the shipping public of an advance over present rates of 2 cents per hundred pounds. Class D includes such articles as beet pulp, bran, shorts, linseed, cake, cerealine (used for brewing) kaffir corn, corn cobs, cotton stalks excelsior, the fibre of cocoanut and palmetto, animal and poultry food, brewers' grain, grain in sacks, corn, oats, rye, wheat, hay, fodder, straw, husks, shucks, malt, meal of various kinds, middlings, oat-meal, palmetto or palm leaves, peas (cow, clay or field), peanut, cribble, flour, grits, bran, hulls, rice (crystal or prepared), rough rice, rice polish (bran, chaff and middling), sea grass, sea weed or salt hay, seed cotton (car load), shavings, wood, not other wise specified, pressed in bales, on all articles of Class D, the proposed increase of 2 cents per hundred pounds, In Class F are to be found the important articles of flour in barrels and half barrels, and grits in barrels. Class F. if the respondents' purposes are made effective, will pay an increase of 4 cents per barrel. Fresh meats will pay an increase of 3 cents per hundred pounds; grain and hay 2 cents per hundred pounds; grain products, 2 cents, and packing house products 3 cents.

The Southeastern Freight Association, through its chairman, Mr. E. H. Hinton, on June 26, 1908, sent out its manifesto termed
152 "Information Issue No. 517," which announces the purpose of the defendant companies and of the Central of Georgia Railway Company, which is not a party to this bill, to "advance present rates" on the commodities and in the amounts heretofore described. The manifesto, or Information Issue, also expressly supersedes the Southeastern Freight tariff and information issues in conflict therewith. It is careful to state that each company acts separately for itself, and with equal care states that the rates, rules and regulations in this tariff are the separate rates, rules and regulations of each of the carriers named and their connections. It will be observed, however, that there is striking unanimity in the rates. They are communicated to each of the separate lines by the chairman of the Southeastern Freight Association, and it is charged that this effectively suppresses competition and forces all connecting carriers either to agree therein, or give up the traffic. All interested lines did concur, acting in this regard through the agency of the Southeastern Freight Association. Subsequently the Louisville & Nashville and the Southern Railway filed with the Interstate Commerce Commission their freight tariffs, embodying the advances in rates above mentioned, and gave notice that said tariffs would become effective

on August 1, 1908. In each of these tariffs, practically every interstate line joined as a participating carrier, the participating lines being 73 in number. The machinery by which the Southeastern Freight Association—alleged to be an unlawful combination in restraint of trade—reaches its effective conclusions, is set forth in the bill. It is charged that the advance in rates is a direct outcome of understandings and agreements in suppression of competition, and in unlawful restraint of interstate trade, accomplished through this machinery; and that the acts of such combination in advancing rates are the result of a conspiracy which is unlawful, as well at common law as under the statutes of the United States.

The proposed advance will effect commodities of prime utility and daily necessity. The complainants and all dealers in the Southeastern States depend very largely for supplies of these commodities from producing territory reached over the lines on which the advanced rates will be demanded. The complainants contend that commodities of this character are entitled to as low a rate as may be consistent with a fair return to the carrier for the transportation rendered; and that the advances will seriously disturb existing trade relations, causing losses to complainants and other dealers,
153 and an increase in the cost of living to the consuming public.

The staple articles affected are necessarily and properly sold by the complainants upon a small margin of profit and the gains result from the large volume of business. It is estimated that the proposed advances will represent a charge or tax to the dealers in the State of Georgia of not less than $500,000, and probably exceeding $1,000,000.00. The consuming public will be forced to bear some portion of the additional tax represented by the proportional increase in the price. While considerable traffic will continue, the increased rates will inevitably restrict its volume reducing the business of complainants and other dealers, and deprive the public, or some part thereof, of the ability to purchase and use these commodities to the irreparable loss and injury of complainants and others similarly situated, and to the prejudice of public interest. The legal remedy, it is stated, is inadequate, for the reason that there will be a constantly recurring grievance incapable of pecuniary estimation. The enforcement of the right of reparation in damages will bring about a multitude and multiplicity of suits. It is not a compensatory charge to fairly meet the cost and value of the services to be performed by the defendants and other carriers, but the advance is an arbitrary and unlawful exaction. The voluntary establishment of reduced rates following the Atlanta conferences, and the maintenance of these rates for more than four years is alleged to be an admission and declaration on the part of the carriers that such rates were reasonably high and compensatory under normal conditions. The carriers prospered until the financial panic of October and November, 1907. While there was some loss then, all lines and classes of business and industry also lost. Now, there is a decided advance in the prosperity of the country, and the net earnings of the defendants and other carriers in recent months have largely increased in some cases, showing net earnings exceeding those of corresponding months of the

preceding year. But the carriers have no right to take advantage of an abnormal condition which is necessarily transitory, nor to make advances in rates upon commodities which are the necessities of daily life. Following these averments the complainants pray that injunction *pendente lite* shall be issued and that the defendants, and each of them, be temporarily restrained from putting into effect the proposed increase of rates to be made effective August 1, 1908, from Ohio and Mississippi River crossings, and points made in relation thereto, to all points in the State of Georgia, affected by said
154 advance; and that upon a final hearing a decree perpetually enjoining said advance may be effective. Discovery is prayed in order to obtain certain evidence in the possession of the respondents, in order to prove certain averments of the bill. There is a prayer for general relief and the usual prayer for process. The bill is properly verified.

On Saturday, the 25th of July, the bill was presented for the consideration of the Court. A temporary restraining order was then issued, but the hearing thereon was fixed for the ensuing Wednesday, the 29th instant, in order that the facts might be heard, and, if possible, the matter in issue determined before the date fixed for the advance of rates. The hearing began on the morning of the 29th, and was concluded about noon on the 30th. In view of the importance of the issue involved, the Court took a short time for consideration.

The respondents first interposed pleas to the jurisdiction. These were overruled upon the grounds stated in the oral opinion (a report of which may be found in the record, except as to the plea of the Cincinnati, New Orleans & Texas Pacific Railway Company. Since this company had not been actually served, the Court took its plea under consideration, and if service is not properly effected, no order affecting its interests will be granted.

The respondents filed no answer and introduced no proof whatever, but rely solely upon a demurrer signed by the solicitors for all of the defendants. This may have the effect of waiving their pleas to the jurisdiction in so far as they relate to the contention that the respondent can only be sued in the Circuit or District of which they are inhabitants. The demurrer, however, denies the jurisdiction of the Court, denies that there is equity in the bill; insists that it is not competent for the complainants to raise any question as to the rates of interstate transportation unless some representative of the public is a party to the record, or unless the Interstate Commerce Commission has passed upon the rates. The demurrer also alleges that there is an adequate and complete remedy at law. These grounds are amplified in several paragraphs.

In support of the averments of the bill, certain affidavits and other documentary evidence were offered. A printed copy of the record in the Supreme Court of the United States in the case of Southern Railway Company *vs.* Tift and others, was also offered, in order that the Court might understand the character of the Southeastern Freight Association, and the methods by which advances af-
155 fecting interstate trade were made by the railways combining to form that association. This record contained the charter

and other documentary evidence used before this Court at a former hearing in the first case relating to this association. No objection was made to the use or competency of such evidence in the present hearing.

Objections were made to the competency of certain documentary evidence offered by the complainants. The Court holding that the objections went rather to the sufficiency than the admissibility of the testimony, no exceptions were noted to the ruling admitting such evidence. The only exception was made to the ruling of the Court sustaining the demurrers of the complainants to the respondents' pleas to the jurisdiction.

The respondents declined to introduce proof of any sort. Since, therefore, the evidence presented by the complainants has not — in any manner contradicted or explained, it must be taken as true. The proof offered was substantially as follows:

The complainant first introduced certain evidence as to the conditions under which the present rates sought to be advanced came into existence. Mr. W. E. Newell testified by affidavit that he was a member of a joint conference committee which was appointed by the Mayor of Atlanta to confer with representatives of Nashville, Chattanooga & St. Louis Railway Company, the Southern Railway Company and other carriers. A conference took place at the Piedmont Hotel in Atlanta, during the month of December and November, 1904. Mr. Oglesby, the chairman for the City Council, and in behalf of the manufacturing and jobbing interests of Atlanta stated their grievances to the representatives of the railroads. Among the causes of complaint were the excess rate- which were charged Atlanta merchants over those charged over Birmingham, Alabama. The negotiations proceeded, and on December 6th, Mr. J. M. Culp, an officer of the Southern Railway, reported their result in part as follows:

"It was the concensus of opinion that the reductions to Atlanta from the west would carry with them corresponding reductions to these points which have been specially related to Atlanta, such as Macon and Athens, and Augusta and Columbus, and that the rates from the East to Atlanta, being reduced in line with the reductions from the West to Atlanta, there would be some reductions to some points in the Southeast; to some of the points in the Southeast from the East the reduction would not be as great as the reduction
156 to Atlanta; now, to intermediate points, there are some points, competitive points, to which the rates bore a fixed relation to the rates to Atlanta, or some other point, that in itself has a fixed relation, and those would be correspondingly reduced."

Another officer stated the concession determined upon by the officials of the railway companies:

"The reduction proposed on first-class is nine cents. The reductions are not uniform throughout the first six classes; the reductions on sixth-class being five cents, and on third-class only three cents. The uniform reductions on meats, grain and flour is two cents per hundred pounds. The rates proposed from Cincinnati, Louisville and the other Ohio River crossings on the first six classes are proposed on the first six classes from Baltimore."

Mr. Culp, of the Southern Railway, then added that a revision of rates in line with these reductions would be made throughout the commodity list and said:

"I don't think there is any doubt but what there will be a reduction made on a considerable number of those commodities."

Mr. H. F. Smith, representative of the Nashville, Chattanooga & St. Louis Railway, then stated before the conference committee:

"I would answer that with the permission of my associates, by saying that those interested in the Atlanta rates reached a compromise with those not having direct interest in the Atlanta rates; I refer to other carriers, carriers whose paramount interest was with other communities. These figures that we submit here to you were considered by those other interests, representing those other communities, and concurred in."

The bases upon which the rates were put in as the result of the Atlanta conference, Mr. Newell further testified were fully considered by the highest officials of the roads at their respective meetings. It was estimated that the amount of flour, hay, grain and mill feed coming to Atlanta alone was about 12,000 cars of 20 tons each per annum. The new rates were made effective February 1st, 1905.

Extracts from Poor's Manual of Railroads, which it was testified is an authoritative treatise on the subject, were then introduced. These all tended to show that the defendants were grouped, as the
157 bill alleged, in two great systems, the one controlled by the Southern Railway Company, and the other by the Atlantic Coast Line Company, and that the lines of the defendants extended throughout all the territory described in the bill.

Mr. H. T. Moore testified in an affidavit that he is the traffic manager of the Atlanta Freight Bureau, and is familiar with freight rate tariffs. He has examined the freight rates, which were of force prior to January 1, 1905, and the Atlanta Conference, the rates thereafter made effective on February 1, 1905, which are the present existing rates, and the rates proposed to become effective on August 1, 1908. He makes a comparison of these rates from certain Ohio River crossings, viz: Cincinnati, Evansville and Louisville, to Albany, Cordele, Dublin, Macon, Valdosta, Atlanta, Athens, Columbus and Rome, all of which will be affected by the proposed increase. To the City of Macon for the commodities included in Class B, the rate prior to 1905 was 37 cents per one hundred pounds; the present rate is 35 cents; and the proposed rate is 38 cents, showing an advance of 3 cents per one hundred pounds above the freight now paid by the complainants, and 1 cent per hundred pounds above that paid in 1904. For Classes C and F the rates will revert to those paid in 1904, but these will be an advance above the present rates of 2 cents and 4 cents for the respective classes. For Valdosta merchants there will not only be advances of 3, 2, 2 and 4 cents for Classes B, C, D and F, above the present rates, but for Classes B, C, and D an increase of one cent per hundred pounds above those paid before the Atlanta agreement. For Atlanta merchants the increase over the present rates will be three cents for Class B, 2 cents for C, 2 cents for D, and 4 cents for F, and

for Class B the proposed advance is one cent per hundred pounds in excess of the freight paid in 1904. For Athens merchants there will be the same increase of 3, 2, 2 and 4 cents above present rates, and one cent for Class B; for Columbus merchants the same advances, and for Rome merchants. In shipments of fresh meats for all of these cities the increase is 3 cents per hundred pounds above present rates, and one cent above those effective in 1904. The freight on flour in sacks is increased 2 cents above the present cost, and for Valdosta one cent per hundred pounds over that in 1904. These are the increases which the complainants contend are illegal.

A report of certain proceedings before the Railroad Commission of Georgia was presented, and extracts were read, showing the
158 relative gross and net incomes of the Southern Railway for the months of March, April and May, 1908, as compared with the earnings for the same months 1907.

Mr. J. M. Culp was questioned by Mr. Callaway of the Railroad Commission of Georgia. For March, 1908, he said the net earnings were $1,067,000, and for March, 1907, $813,000, showing two hundred and odd thousand dollars increase. For April, 1908, the net earnings showed an increase of $339,000 over those for April, 1907, and for May an increase of $90,000. These results, he said, were accomplished by a drastic reduction of expenses *that* the year ending June, 30, 1907, while the greatest gross year was not the greatest net year of the company, and that it was exceeded by the year 1908.

Mr. Culp then stated that the net earnings of the railway in Georgia showed a decrease in July, 1907, of $89,500.00; in August $90,300; in September $51,500; in October $92,000; in November $68,000; in December $82,500; in January, 1908, $76,000; in February $55,000; in March the small decrease of $1,146, and in April an increase of $24,000. These statistics, it is contended, show that the financial conditions which grew out of the recent panic are rapidly improving; that the earnings of the defendants are increasing and do not justify the imposition of such burdens on complainants and the public, as are attempted by the proposed advances.

Cumulative evidence was offered on this line in the nature of extracts from the financial news published by the Atlanta Journal, and giving the quotations of the stock of the different defendant companies, for the fifteenth day of each month, beginning with July 15th, 1907, and ending July 15, 1908.

A brief summing up of the statements in this affidavit shows that the quotations of Atlantic Coast Line preferred stock on July 15, 1907, were 98; August 77¼; September 82; October 70¼; November 64¼; December 65½; on January 15, 1908, 72½; February 63; March 65; April 73; May 90; June 90, and July 92. For Louisville & Nashville preferred the quotations for these months ran 117, 104, 108, 100¼, 93½, 90, 100⅞, 98¾, 96½, 99, 109½, 107¼, 108⅞. For Southern Railway common stock 20½, 16½, 15½, 11⅝, 12, 12⅞, 10⅛, 9⅞, 11, 13¾, 17⅞, 17⅜, 17⅞. For Southern Railway preferred 56, 55⅞, 46, 37½, 93¾, 35, 31½, 29⅛, 39¼, 44⅞, 45½, 45½. These figures indicate that while the stock of these com-

panies showed great depression during the late fall and winter
159 under the effect of the panic throughout the country their value during the last three months has rapidly increased to a normal condition.

As further proof of their contention that the proposed increases are arbitrary and not justified by business conditions, extracts were introduced by the complainants from "The Commercial and Financial Chronicle," published by William B. Dana Company at New York, and sworn to be a reliable financial journal, whose statements are accepted as correct by stock brokers and the public generally, by this the range of prices and the sales of the stocks of the respective defendants was shown for different periods in 1907 and 1908. For the Atlantic Coast Line Railroad the lowest price for 1908 of 59½ was on March 2nd, while the highest price of 96 was on July 21st; for 1907 the price went as high as 133⅛ in January, but it went to as low as 58 in November. On Friday, July 24, 1908, the lowest price was 94 and the highest 95, while for the week ending on that day 4035 shares were sold. For the Louisville & Nashville Railroad Company these statistics show that the lowest price of its stock for 1908 at 87¼, was on February 19th, and the highest price of 113 was on May 19, 1907; it went as high as 145⅛ in January, but dropped to 85½ in November. During the week ending July 24th the price ranged from 107½ minimum to 111⅜, on July 23rd, while 12,000 shares were sold. For the Nashville, Chattanooga & St. Louis, the lowest price of stock for 1908, 97¾, was on January 2nd, and the highest price of 120 was on July 24th; for 1907 it went to 147 in January, but fell to 97 in December. 100 shares were sold for the week ending July 24th. For Southern preferred the lowest price for 1908 25½, was on March 5th, and the highest of 50½ on July 21st, for 1908; the lowest, 29½, was in November, and the highest, 94½, as in the case of the other companies, was in the opening of that year. During the week stated 36800 shares of what is termed "common stock," and 10,075 of preferred stock were sold. This data all tends to show a gradual decrease of the stock from November of last year, when they reached their minimum. For all of these companies save one, maximum prices of their stocks were reached during the week prior to the hearing and the last week for which these statistics of this journal have been compiled. For the Louisville & Nashville, while a maximum of 113 is reached in May, yet on July 23rd it was 111⅜, and on July 24th, 110, only a few points below the maximum obtained during this year.

As significant of a general improvement of financial condi-
160 tions throughout the country, the complainants submitted data showing the bank clearings of the large cities in different sections. Thus New York, Philadelphia and Pittsburg are classed among the middle group. The figures for this group show a decrease of 9.1 per cent. in the returns for the week ending July 18, 1908, from those of the same week in 1907. The New England group, including Boston, Hartford, New Haven and other cities, show a decrease of 3.5 per cent.; the Western group, including

Chicago, Cincinnati, Cleveland and others, a decrease of 2.7 per cent.; the Pacific group, including San Francisco, Los Angeles, Seattle, Portland and others, a decrease of 13.2 per cent.; another Western group, including Kansas City, Minneapolis, St. Paul and Lincoln, a decrease of 3.8 per cent.; and the Southern group, including St. Louis, New Orleans, Louisville, Atlanta, Savannah, Macon, Columbus, Memphis, Nashville, Mobile, Birmingham, and practically all our large cities, a decrease of 7.6 per cent. For the entire country the decrease over last year in clearing house returns is 7.8 per cent.

Illustrative of the earnings of the defendant railways the certificate of the secretary of the Railroad Commission of the State of Georgia was introduced. The Western and Atlantic Railroad, of which the Nashville, Chattanooga & St. Louis Railway is a lessee, and the Louisville & Nashville has trackage rights from July, 1907, to May, 1908, inclusive, made a net profit of $623,907.76, and for the same months of 1906 and 1907, $592,475,31; and for the same months of 1905 and 1906, $625,792.06.

Mr. W. F. Small, general manager of the A. B. Small Co., one of complainants, testified that he is a wholesale dealer in grain, flour, meats, hay and other articles on which the advances in rates are threatened. He has made a careful estimate of the extent to which the advances will effect his business, on the basis of the volume of business transacted by the company in 1907. The increased rates which his company will have to pay per annum, if the advances are made effective, will be $14,619.72. He estimates that the total amount of advances which would have to be paid by the merchants in the City of Macon would be $65,000.00, and in the State of Georgia $750,000 per annum. Following the Atlanta Conference in 1905, and the subsequent decrease of freights, he says, a large traffic has moved, and conditions have become so adjusted to the trade that to change the present rates would disturb trade conditions and existing contracts, based on those rates, and cause a serious loss, both to consumer and dealer.

161 The margin of profit to the dealer in the affected commodities is very small, and while it would be possible for him by increasing the price to absorb a part of the increase in freight rates, and pass the same along to the consumer, it would be impossible at least until conditions adjusted themselves to absorb the entire increase in said freight rates, and in this manner a large loss would ensue to the dealer and consumer. He states that the largest part of the supply of commodities to this State comes from points beyond the Mississippi and Ohio Rivers, and it is affected by the threatened advance. While it is true that following the financial panic in the fall of 1907 there was a general business depression, trade in the commodities affected is rapidly assuming a normal condition, and in the opinion of the deponent a vast amount of tonnage will move from the West to the State of Georgia.

To the same effect was the testimony of Mr. R. C. Corbin, the manager of the Macon Grocery Company in the City of Macon. He

timates the loss of the company at $6000 per annum and of Macon erchants at $35,000 per annum, and in the State of Georgia at 500,000.00.

Mr. A. C. Wooley, of A. C. Wooley & Company, testified that in 907, his company received 7,800,000 pounds of the products on hich the proposed advances are sought to be made, and that he timates the additional cost per annum at $1,560. Mr. Thomas . Rogers of Kelly Brothers Company estimates the amount affect- g his firm at #13,685,927, at an increased cost of $2,737.18. Mr. one M. Maddox, of J. J. Maddox Company, states the quantity at ,000,000 and the amount at $1,000.00. Mr. R. W. Davis of R. W. avis & Company at $1,000.00, Mr. E. L. Adams of Adams-Whit- ey Company at $457.77, Mr. W. S. Duncan of W. S. Duncan & ompany, 60,669,693 pounds, and $12,133.92; Mr. F. B. Coleman f McCord, Stewart & Company at 22,429,536 pounds, and 4,685.81; and Mr. A. T. Morgan, of A. T. Morgan Grain Company 34,500,000 pounds and $6900.00.

The complainants then closed.

62 (*Opinion of the Court, August* 1, 1908.)

PEER, *Judge* (after making the above statement of the case:)

It is most significant that while there were in attendance on the earing at Mount Airy, a large number of counsel and railway fficials of great experience, extensive knowledge, and high rank, o sort of effort was made to contradict or explain any of the evi- ence offered by the complainants. The Court was furnished neither ith affidavits, oral testimony, or explanations, relating to the grave nd serious complaints set forth in the complainants' bill, and sup- orted by proof. The respondents were content to rely on their emurrer, and the argument was restricted to the following points: irst, that the Court had no jurisdiction; second, that the Interstate ommerce Commission has no jurisdiction with regard to these ates; and, third, that if the new rates were put into effect, it would erely restore the rates which existed prior to 1905, and that such ates are reasonable. The last point is a question of fact not raised y answer or in any appropriate form. It does not appear in the ecord; nor if the pleadings and proof justify the consideration of his assertion, would it appear material to the present inquiry at his stage of the case.

A condensed statement of the case will, it is thought, suffice to scertain the rights and responsibilities of the parties as they appear rom the record. It is insisted that the Court is without jurisdic- on to stay the enforcement of rates, confessedly imposed by a con- essedly unlawful combination in restraint of trade, which will in ll likelihood withdraw and withhold for many years from the esources of complainants many thousands of dollars, thus exacted, nd during all this time give the use of such sums to the respond- nts, with a consequent disorganization of business increase in the

price of living, diminution in the profits of the manufacturer and the producer, decrease in the purchasing capacity of the salary or wage earner, and a possible paralysis of that recuperative movement which elevates and brightens the hopes of the people at this time. This contention is based upon the assertion that a Circuit Court of Equity of the United States has no jurisdiction to accord the relief, or any effective part of the relief sought by this bill. The proposition of the respondents is based upon a bold and unqualified denial of any judicial power in this country to restrain any rate, however enormous it may be, levied for transportation in interstate
163 commerce, *now* [no] matter how flagrantly in violation of the inter-state commerce law, or the penal statutes of the United States that imposition may be. The position of the respondents is made clear by the following colloquy between the Court and their counsel:

"Judge SPEER: You stated yesterday these shippers cannot sue in the State Courts?"

Mr. H. L. STONE: They cannot sue anywhere until the commission has passed upon it.

Judge SPEER: You might then increase the rate 50 per cent. or to any amount and the shipper has no redress?

Mr. STONE: We may assume many impossibilities.

Judge SPEER: Then the whole power is with the railroads?

Mr. STONE: Not at all, sir; I do not concede that. Congress has prescribed these particular regulations to regulate commerce, and they must be regulated accordingly, and not otherwise. A rate so far as it is initial is concerned, is left to the carriers by Congress. Congress could prescribe rates itself if it was desired to do so, if it was thought wise, for all of these carriers to observe. It delegated to the commission the power on complaint, after full hearing, to substitute a rate of freight for the one fixed by the carriers. In the meantime Congress has provided in its wisdom that those rates thus initiated and put into effect by the carrier itself, not by Congress and not by the commission, should be the only legal rate and that no more, no less, or different rate can be collected by the carrier.

Judge SPEER: You collect, say from a Georgia shipper, this increase of rate, his only right of redress is a suit against your railroad?

Mr. STONE: After the commission has held the rate to be
164 unreasonable and fixed the amount of his damages, and allowed the carrier a certain time in which to pay it. Then he can go into Court.

Judge SPEER: Then you contend that the only district in which (the carrier) may be sued is in the district of which he is an inhabitant?

Mr. STONE: That is in a suit for an award of damages. There is no provision in the Interstate Commerce Act that the shipper may file an injunction suit in a district outside of that in which the carrier has his principal operating office, or in which he is an inhabitant.

Judge SPEER: Then the American people are in the attitude in relation to the railroads that the railroads can levy rates, whatever they choose to levy, no matter how extravagant they may be, and no

individual has any redress until he has prosecuted his case before the Interstate Commerce Commission, and until he has then prosecuted it further before a United States Court having jurisdiction—that is to say where a railroad is an inhabitant. In the meantime, the railroad company can keep his money, and the money of everybody of like standing?

Mr. STONE: Unquestionably, sir, and if there is any fault with that system, the complaint should be made to Congress for amendments to the acts, and not to the Court.

It follows that if the proposition of respondents on this subject is maintainable, all that the genius of executive statemanship, the assiduity and learning of jurists, and the patriotic purposes of Congress have attempted toward the settlement of the vast controversies involved in the regulation of interstate commerce will be profitless and indeed impotent. While this is true the various conspicuous and combined mentality of those distinguished corporate specialists, who like the chorus of the Greek tragedy, clustered about the Coryphœus of the drama, played in the humble school house of this mountain village, was able to point out not one controlling precedent for a contention so vital for the future of the country. Precedents it is true were cited, but at a glance they are distinguishable from the case before the Court, and the decisions of the Supreme Court of the United States and the other Courts which uphold the
165 jurisdiction assailed. The first, and the most important of these is the case of the Texas & Pacific Railway Company *vs.* Abeline Cotton Oil Company, 204 U. S., page 426. What seems the cardinal error of the learned counsel for the respondents in his attempt to apply this precedent to the case at bar, is that he fails to distinguish between an action in a State Court at common law, and a suit in equity in a Circuit Court of the United States. The distinction is discoverable, and we believe is generally understood. In the Abeline case, the oil company brought an action at law to recover $1,951.83. This sum had been exacted over the protest of the company for the shipment of car loads of cotton-seed. Among other defenses the railway company defended on the ground that the shipments were interstate and were therefore governed by the Act of Congress to regulate commerce. The rate had already been established, and it had not been pronounced unreasonable by the Interstate Commerce Commission. The trial Court of first instance made findings of fact: (1) That this was an interstate shipment; (2) that the defendant complied with the interstate commerce law, except that the rates were excessive; (3) that the rate charged by the defendant was that established under the interstate commerce law. But it held that the plaintiff could not recover. It was a Texas case and the Court of Civil Appeals of that State reversed the decision of the trial Court and found but one question essential for its decision; that was, "whether consistently with the Act to Regulate Commerce there was power in the Court to grant relief upon the finding that the rate charged for the interstate shipment was unreasonable, although such rate was the one fixed by the duly published and filed rate sheet, and when the rate had not been found

to be unreasonable by the Interstate Commerce Commission." The Court then proceeded to grant what it termed "relief," which was a judgment for the excessive freights charged. The Supreme Court in a very clear and strongly reasoned opinion by Mr. Justice White reversed this conclusion. Throughout the opinion the observations of the learned justice were directed exclusively to actions at law for damages and attempts to obtain pecuniary reparation, in other words to actions at common law, and indeed to such actions in State Courts. Again and again he reiterates the inimical effect upon the interstate Commerce laws enacted by Congress of the action of "Courts and juries," in different States. He sums up the conclusions of the Court as follows:

166 "In other words we think it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in Courts, to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can consistently with the context of the act be redressed by Courts without previous action by the commission and therefore does not imply the power in a court to primarily hear complaints concerning wrongs of the character here complained of" (*i. e.* a claim for damages at common law).

The cases cited by the learned Associate Justice in support of his conclusions also clarify the differentiating view between that case and the case at bar. Swift *vs.* Philadelphia, etc., R'y Co., 64 Fed. 59, was an action at law to recover damages. So also in Gulf Colorado, etc., R'y Co. *vs.* Hefley, 158 U. S. 98, the carrier refused to deliver because the shipper would not pay a higher established schedule rate than that specified in the bill of lading. The judgment of a State Court enforcing the penalty was reversed upon the ground that the State Statute was repugnant to the Act to Regulate Commerce, in Texas & Pacific R'y Co. *vs.* Mugg, 202 U. S. 242, also cited by the Associate Justice, a recovery at law of the excess freight above the quoted rate was allowed by the Texas Court. The Supreme Court reversed this judgment. The upshot of the Abeline case and of all the decisions cited by the learned Justice sustains the counsel for the respondents in his unreserved proposition that the shippers have no relief whatever at common law in the Courts of a State against exactions however unwarrantably made by the carriers of interstate commerce. Let us see, however, whether this dominating principle is applicable to a case like that before this Court, where a number of shippers seek to prevent, by report to the strong and flexible powers in equity of Courts of the United States, the imposition of rates, declared and admitted to be unreasonable, and confessedly (for the demurrer confesses it) imposed in violation of the Anti-Trust Law, denouncing combinations in restraint of trade and commerce.

The Abeline Cotton Oil Company case which we have been discussing was decided February 25th, 1907, on May 27th, of the same year, the Supreme Court had under review from this Court the case of the Southern Railway Company *vs.* Tift (206 U. S. 428), otherwise known as the "lumber rate case." In the Tift case in the Cir-

cuit Court, the identical objections for want of jurisdiction
167 with which the complainants are here confronted was here presented in several hearings. There, too, when the bill was filed, the rate had not been enforced. As in the case at bar it had been merely threatened. The case may be found reported in 123 Fed. 739, and the decision in the second and final hearing in 138 Fed. 753 (Federal Anti-Trust Decisions, II Vol., p. 733). Said the Court in the first of those cases:

"It is, however, insisted that this power of the Court cannot be exercised until the Interstate Commerce Commission has acted, but that commission is expressly denied the power of injunction or any judicial power. This it has been conclusively held remains with the Courts. Interstate Commerce Com. *vs.* C. N. & T. P. R. Co., 167 U. S. 479. How, then, can it be said that the original and plenary power of the Court of Equity in such matters must be postponed to await the action of the Interstate Commerce Commission? It is true that the statute regulating interstate commerce, permits a resort to the common law action for damages for violation of its provisions, and it is urged that this remedy is exclusive. This does not follow. In the nature of things there must be a vast variety of controversies in which the remedy at law on action brought by the individual wronged is utterly inadequate to afford relief either to the individual or to multitudes who are in similar case with him. It is often in the power of a railroad company to greatly injure or wholly destroy one's business, or a general business of a particular class. In such case injunction would be the appropriate remedy. So an injunction is granted to prevent illegal discrimination and illegal exactions in excess of rates fixed by law. This is upon the ground in part that the injury being a constantly recurring one there is no adequate remedy at law. I High on Injunc., Sec. 618, etc. It may safely be declared that a Legislature will never be presumed to have denied by implication those general powers of a Court of Equity, which have been engraved in our jurisprudence "for the correction of that wherein the law (by reason of its universality) is deficient." Because one special remedy has been *afforded* it does not follow that the general powers of equity are annulled."

The case of U. S. *vs.* Union Pacific R. Co., 160 U. S. 1, was cited and the language of the Court quoted as follows:

"It is not enough that there is a remedy at law. It must
168 be plain and adequate as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

Numerous other authorities were cited in support of these propositions. It follows that the challenge to the jurisdiction could not have been more definitely made or more definitely decided. We have seen that jurisdiction was maintained. An appeal was then taken to the Supreme Court of the United States. Now there is nothing about which that great Court is more sensitive than an unauthorized exercise of jurisdiction on its own part, or on the part of any of the "inferior Courts," created by Congress. It has often held that it is

the duty of such Courts *sua sponte* to raise the question of jurisdiction, even though the parties should fail to do so. No failure of jurisdiction can escape the perspicacity of that august tribunal. Its holding then in the Tift cases seems conclusive of this controversy. Said Associate Justice McKenna for the Court (Southern R'y Co. *vs.* Tift, 206 U. S., page 437):

"In the case at bar there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions in view of our decision in Texas & Pacific R'y Co. *vs.* Abeline Cotton Oil Company, 204 U. S., p. 26, upon a different record than that before us. We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the Interstate Commerce Act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates."

What fairer or more obvious distinction has been indicated by the Supreme Court? In the Abeline Cotton Oil Company case in an action at common law they deny jurisdiction. That was a different record from this before them, but because of that decision they were not required to say that a "suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates, or a change to unjust or unreasonable rates." If the Court had been so required it would have made the requirement effective. The absence of jurisdiction and the requirements are one and the same thing. Since the great tribunal was not so required, there is no law to forbid a suit in equity "to prevent a filing or enforcement of a
169 schedule of unreasonable rates, or a change to unjust or unreasonable rates."

The demurrer here admits the case before us to be a suit of that precise character. The learned counsel who argue this question had much to say of the difference between the record in the Tift case and the record in the case now before the Court, and much to say of the remarkable care of counsel to keep out of the record in this case certain features which appeared in the record of the Tift case. It will be difficult however to eliminate the fundamental question of jurisdiction which was raised in both and which the Supreme Court would have raised if the parties themselves had not raised it. It is true, as stated by the learned counsel for the respondents, that something was said about the stipulation in the Tift case by Associate Justice McKenna. But the stipulation only related to reparation, and to the admission of evidence. No stipulation, however, could have given the Court jurisdiction. That has been repeatedly held. The jurisdiction of the Court in Equity, and its jurisdiction as a Court of the United States, is thus immovable [immovably] fixed. It is true that because the railroads there promised to pay back to the shippers the sum total of the excess charges, the Court did not grant the injunction, but it is not unsafe to say that save for that stipulation, the injunction against the increase would have been promptly granted. The case was sent to the Interstate Commerce Commission,

and its assistance invoked. Upon this the Supreme Court observes (page 437):

"The Circuit Court granted the relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission * * * etc."

But if we were without the assistance of the paramount authority of the Supreme Court, abundant support of the jurisdiction may be found in the decisions of the Circuit Courts and the Court of Appeals of our own circuit. In the case of Blindell *vs.* Hagen, *et al.*, 54 Fed., page 40, that brilliant lawyer and jurist, the late Judge Billings, while holding that the Anti-Trust Law along [alone] did not authorize the bringing of injunction suits, or suit in equity by parties other than the government, yet he maintained the jurisdiction of the Circuit Court to enjoin a combination of persons from interfering with the rights of a party, in order to prevent a multiplicity of suits at law and for the reason that damages at law for interrupting business and interstate profits of pending enter-
170 prises must be conjectural and not susceptible of proof. Quoting from Fonblanque's Equity, at page 3, the learned Judge said:

"The foundation of this jurisdiction of equity is the probability of irreparable mischief, the inadequacy of a pecuniary compensation and the prevention of a multiplicity of suits."

An appeal was taken to the Circuit Court of Appeals, Circuit Judges Pardee and McCormick, and District Judge Toulmin presiding, and that Court maintained the jurisdiction on the general principles of equitable jurisdiction.

In the case of Gulf C. & S. Ry. Co. *vs.* Miami Steamship Company, 86 Fed., page 429, the Circuit Court of Appeals of the Fifth Circuit, Circuit Judges Pardee and McCormick, and District Judge Swayne, presiding, declared:

"We do not doubt the general jurisdiction of the Circuit Court as a Court of Equity to afford preventive relief in a proper case against threatened injury about to result to an individual from any unlawful agreement, combination or conspiracy in restraint of trade."

Judge McCormick, for the Court, in a strong and carefully considered opinion refers to the case of United States *vs.* Debs, 158 U. S. p. 564. There the Circuit Court had rested its jurisdiction mainly on the Anti-Trust Law, but the Supreme Court, to use the language of Judge McCormick, "entered into no examination of that act, preferring to rest its judgment on the broader ground of the general jurisdiction of a Court of Equity to prevent injury in such cases." "The Supreme Court," however, he continues, "was careful to observe that it must not be understood, from its putting its judgment on the broader ground that it dissented from the conclusion of the Circuit Court in reference to the scope of the act."

We understand, although the opinion has not been reported that a similar conclusion has been reached by Judge Cornelius H. Hanford of the District of Washington, in a case of threatened advance of rates from points on the Pacific Coast.

In a recent case not yet reported, Kiser Company *vs.* Central of

Georgia R'y Co., *et al.*, decided by Judge Newman at Circuit — in the Northern District of Georgia, an analysis of the Albeline Cotton Oil case and of the Tift case was given by that eminent jurist. He remarks:

171 "From what is said in both cases the ruling would seem to be that general power over interstate rates to be charged by common carriers is given to the Interstate Commerce Commission, and that for the Courts to undertake to determine what are reasonable or unreasonable rates would interfere and conflict with the exercise of its power by the commission, although instances might arise in which it would be proper for a Court of Equity to enjoin the enforcement of unreasonable rates, or a change to unjust or unreasonable rates; * * * this action of a Court of Equity will not interfere with the final exercise by the Interstate Commerce Commission of the full powers granted to it by the Act of Congress of 1887 * * * or under the Act of June, 1906, "to determine and prescribe what will be a just and reasonable rate, charge or charges, to be hereafter observed as a maximum to be charged. This seems to be the clear meaning of these decisions. It appears therefore that the Court might properly enjoin carriers from establishing or increasing to an unreasonable rate, at the same time leaving the matter in such shape that the Interstate Commission may ultimately determine whether the contemplated increase is just and reasonable."

The learned Judge held that the restraining order should remain in force a reasonable length of time to allow complainants to present the controversy to the Interstate Commerce Commission, and that the case should be stayed until the determination by that body as to whether the proposed increase in rates was reasonable and proper and as to what was the reasonable rate.

This was the course taken in the Tift case, and, as we have intimated in the ruling on the pleas to the jurisdiction, the same direction will be given now. We have no doubt that the Interstate Commerce Commission will promptly take hold of the controversy, But it is said that the commission can do nothing until the rates have been put into effect and the money of the shippers collected. This is a very comfortable doctrine for the respondents. It is not, however, borne out by the conduct of the commission in previous cases (as we understand in the Pacific Coast "lumber rate case) or by the language of the Act Regulating Commerce." Section 13 provides how and by whom complain*ants* can be made and served, but it also declares that said commission may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." The jurisdiction of the com-

172 mission is then fixed to pass upon the proceeding here. But must the commission wait until the rate is collected? No. [not] so. The Act of Congress known as "the Hepburn Act," amendment of June 29, 1906, provides, "that the commission is authorized and empowered, and it shall be its duty whenever, after full hearing upon a complaint made as provided in Section 13 of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates or charges whatsoever, demanded,

charged or collected by any common carrier or carriers, subject to the provisions of this Act to act thereon, etc. In addition to this by the same section the commission is empowered, after hearing on a complaint, to establish through rates "as a maximum to be charged, etc." Since then the commission has the power to make the inquiry of its own motion, it is scarcely probable that it would refuse to do so at the request of shippers, directed to appear before it by a Court of the United States. Since they have the power to fix a maximum rate, they can readily determine whether the increase which is threatened or "demanded," and which but for the injunction would this day have been "charged" by these respondents, is justifiable. This is a practical solution of the difficulty. To quote anew the language of the Supreme Court in the Tift case, it is not "prejudicial" to the respondents. The commission has the power to advance the hearing, and promptly dispose of it. Its action would thus confound the unqualified asserting of the learned counsel for the respondents here, but no person who is threatened with injury of this character, no matter how *omnious* or odious may be the exaction, is lawfully entitled to a hearing anywhere before any tribunal, until the exaction is enforced, and his money is taken.

The rates which the defendant companies now propose to increase were fixed after careful conference by agreement with bodies of the people representing shipping interests. Under them, the railroads and the country had attained a prosperity as hopeful as either had ever known. The temporary depression which ensued was not ascribable to the insufficiency of these rates. Great bodies of the people, indeed, insisted that they were too high, and the agitation which resulted doubtless contributed in some measure to the business depression which followed. From this the country is rapidly recuperating. The reports of stock sales and bank clearings in evidence show this to be true. It should be remembered that nothing offered by the complainants has been, in any sense, contradicted or disproved. In
173 view of the character of the discussion before the Court, it is perhaps appropriate to say that the vast majority of our thoughtful people have no unkind feeling toward the railroads. Indeed, they have manifested a warm and cordial sympathy with these truly great men of whom many hold high station in these great companies, and who toil with constancy for the betterment of their properties, for the betterment of their properties, and, as a consequence, for the welfare of the country. Significant of this disposition by a decided majority, the people have recently nominated for Governor of our State a railroad man, whose upright character and whose complete familiarity with these and kindred topics may give assurance that corporate, and as well, private and public, interests will be lawfully conserved. And yet while the ink is scarcely dry on his letter of acceptance, Georgia and three other States, barely all convalescent from the wasting fever of panic, are threatened with an advance of rates, some of which (as it appears from the uncontradicted proof) will make the charges of transportation for the necessities of life greater than they have been in the memory of a generation. No policy could be more disastrous to the

efforts of conservative government. Nor are the Courts less entitled that the people to consideration from the representatives of the railroad companies. When lately, in North Carolina and Alabama, their rates were assailed they sought the protection of these Courts. In proper cases it is always afforded them. It may be well if more temperate and considerate bearing shall attain in their management and representation, even in those cases where they do not prevail.

In accordance with these views an interlocutory decree will be granted declining to dissolve the temporary restraining order now of force and continuing the same in full effect until the further order of the Court. The decree will also provide in effective terms, that the complainants and others who may have the right to intervene, shall within ten days make complaint to the Interstate Commerce Commission (ask that body, if necessary) that it may take the initiative in this investigation; if need be, fix the maximum rates; and give such other aid and assistance to the parties in controversy and to the Court, as in the judgment of the commission may seem in accordance with the law and the rights involved.

(Indorsement:) No. 590. U. S. Circuit Court, Western Division, Southern District of Georgia. Macon Grocery Company, *et al., vs.* Atlantic Coast Line R'y Co., *et al.* Statement of the Case and Opinion of August 1, 1908. Filed August 6th, 1908. Cecil Morgan Deputy Clerk.

174 (*Motion to Assign Demurrer for Hearing.*)

In the United States Circuit Court for the Western Division of the Southern District of Georgia.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE R. R. CO. ET AL.

In Equity. Bill, etc.

Now come the complainants by their counsel, in the above entitled case, and move the Court to set the demurrer to the bill of complaint filed by the respondents therein for argument,

WIMBISH, WATKINS & ELLIS,
AKERMAN & AKERMAN,
Counsel for Complainants.

(Indorsement:) U. S. Circuit Court, Western Division, So. District of Georgia. No. 590. Macon Grocery Co., *et al., vs.* Atlantic Coast Line R'y Co., *et al.* Motion to Assign Demurrer for Hearing. Filed August 3, 1908. L. M. Erwin, Deputy Clerk.

Interlocutory Decree.

In the Circuit Court of the United States for the Southern District of Georgia.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Bill. In Equity.

Interlocutory Decree.

The above entitled cause came on to be heard on July 29th, 1908, on the rule issued against the defendants to show cause why an injunction *pendente lite* should not be granted.

Defendants, and each of them, appeared specially and objected to the jurisdiction of the Court over the persons of the defendants; and the Court being of the opinion that the Court did have jurisdiction over the persons of the defendants in this cause, and so announcing, thereupon the defendants, and each of them, filed a joint and several demurrer and presented the same as cause in law why the relief prayed should not be granted.

175 Thereupon proof was submitted in behalf of complainants in support of the averments of their bill, and the cause was argued by counsel for the respective parties.

At the conclusion of the hearing on July 30th, 1908, the Court took the matter under advisement until August 1st, 1908, when the opinion of the Court was handed down sustaining the contention of the complainants and directing an issuance of the injunction prayed for upon the condition that complainants should within ten days present their complaint to the Interstate Commerce Commission for investigation and determination of the reasonableness of the rates involved.

And it appearing that the complainants together with other persons in the cities of Atlanta, Columbus, Rome and Athens, Georgia, have this day filed with the Interstate Commerce Commission their complaint praying the commission to investigate and determine the reasonableness of the rates involved, also to declare what are just and reasonable maximum rates.

The Court being now fully advised in the premises it is thereupon considered, ordered and decreed as follows, to-wit:

That the defendants, the Atlantic Coast Line Railroad Company; the Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company, and each of them, be and they are hereby jointly and severally enjoined from enforcing collection of the advance in rates made effective August 1st, 1908, from Ohio and Mississippi river crossings, Nashville, Tennessee, and points with relation thereto, to all points within the

State of Georgia, on Classes B. C. D. and F. fresh meats C. L. grain products, hay, and packing house products; this injunction to continue and remain in force pending an investigation and determination of the reasonableness of the rates involved, by the Interstate Commerce Commission, or until further order of the Court.

Dated and signed this August 3rd, 1908.

EMORY SPEER,
U. S. Judge.

August 3rd, 1908.

[Indorsed:] No. 590. In Equity. In United States Circuit Court, Southern District of Georgia. Macon Grocery Company, *et al., vs.* Atlantic Coast Line Railroad Co., *et al.* Interlocutory Decree. Filed August 4th, 1908. Cecil Morgan, Deputy Clerk.

176 *"Petition for Appeal."*

In the Circuit Court of the United States for the Southern District of Georgia, Western Division. In Equity.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITTS & COMPANY, F. W. HAZLEHURST COMPANY, ADAMS & JOHNSTON, a Partnership Composed of B. B. Adams and D. T. Adams and C. Y. Johnston; SOLOMON & McREA, a Partnership Composed of W. D. Solomon and D. I. McRea; R. T. BIRDSEY & COMPANY, a Partnership Composed of R. J., J. F., and S. R. Birdsey; GEORGE A. MCARTHUR, PEOPLE'S GROCERY COMPANY, PARKER-WILLIS COMPANY, CORDELE GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S. PENDLETON COMPANY, DALTON GROCERY COMPANY, MARION CURRY, ORR-SMITH GROCERY COMPANY, BRANDON & DRYER, a Partnership Composed of D. S. Brandon and E. Dryer; GALLAHER GROCERY COMPANY, a Partnership Composed of C. D. and H. W. Gallaher, Complainants,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, SOUTHERN RAILWAY COMPANY, and CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Defendants.

Petition for Appeal.

To the Honorable Judges of said Court:

Your petitioners, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, Southern Railway Company, and Cincinnati, New Orleans & Texas Pacific Railway Company, defendants in the above entitled cause, considering themselves aggrieved by the interlocutory order, dated the 3rd day of August, 1908, signed by the Honorable Emory Speer, Judge of said Court, whereby it was ordered and de-

creed that the said petitioners, the defendants in the above entitled cause "are hereby jointly and severally enjoined from enforcing collection of the advance in rates made effective August 1, 1908, from Ohio and Mississippi river crossings, Nashville, Tennessee, and points with relation thereto to all points in the State of Georgia, on Classes B, C, D and F, fresh meats, C. L. grain, grain
177 products, hay and packing house products, this injunction to continue and remain in force pending an investigation and determination of the reasonableness of the rates involved by the Interstate Commerce Commission, or until the further order of the Court," hereby petition said Court for an order allowing defendants and each of them to prosecute an appeal from said interlocutory order, granting said injunction to the Circuit Court of Appeals, for the Fifth Circuit, for the reasons specified in the assignment of errors simultaneously filed herewith under and according to the laws of the United States in that behalf made and provided, and also that an order be made staying, superseding and suspending said order and injunction until the determination of said appeal by the United States Circuit Court of Appeals for the Fifth Circuit, and that a transcript of the record, proceedings and papers, upon which said interlocutory order and injunction was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit.

And your petitioners will ever pray.

ATLANTIC COAST LINE RAILROAD COMPANY,
By W. E. KAY,
GEORGE B. ELLIOTT, AND
ROBERT C. ALSTON,
Its Solicitors.

LOUISVILLE & NASHVILLE RAILROAD CO.,
By HENRY L. STONE, *General Counsel.*

SOUTHERN RAILWAY COMPANY,
By CLAUDIAN B. NORTHROP AND
SANDERS McDANIEL,
Its Solicitors.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.,
EDWARD COLSTON,
SANDERS McDANIEL,
CLAUDIAN B. NORTHROP,
Its Solicitors.

NASHVILLE, CHATTANOOGA & ST. LOUIS RY.,
By Its Solicitors, CLAUDE WALLER AND
JOHN L. TYE,
EDWARD BAXTER,
Solicitor for All Petitioners.

Appeal allowed:

DON A. PARDEE,
Circuit Judge.

(Indorsement:) U. S. Circuit Court, Western Division, Southern District of Georgia. Macon Grocery Company, *et al., vs.* At-
178 lantic Coast Line R. R. Co., *et al.* Petition for Appeal. Filed August 5, 1908, and clerk will file of same date. Don A. Pardee, Judge. Filed August 5th, 1908. Cecil Morgan, Deputy Clerk.

Assignment of Errors.

In the Circuit Court of the United States for the Southern District of Georgia, Western Division Thereof. In Equity.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Assignments of Error.

And now at the time of filing their petition for an appeal in the above stated case, come the defendants, the petitioners for said appeal, to-wit: Atlantic Coast Line Railroad Company; Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company, and file with their said petition for appeal, these their assignments of error and say that the Circuit Court of the United States for the Southern District of Georgia, Western Division, and the said Honorable Emory Speer, the Judge therein presiding, erred in the following decisions and particulars, to-wit:

I.

In continuing and granting by the interlocutory decree of August 3rd, 1908, the preliminary injunction whereby it was ordered and decreed that said defendants, and each of them be and they were jointly and severally enjoined from enforcing collections of the advance in rates made effective August 1, 1908, from Ohio and Mississippi river crossings, Nashville, Tennessee, and points with relation thereto, to all points within the State of Georgia, on Classes B, C, D and F, fresh meats, C. L., grain, grain products, hay and packing house products, and that said injunction shall continue and remain in force pending an investigation and determination of the reasonableness of the rates involved by the Interstate Commerce Commission, or until the further order of the Court.

179 II.

That said Court and Judge erred in overruling the special pleas to the jurisdiction filed by each of said defendants and sustaining the demurrers thereto filed by complainants, each of said pleas being based on the grounds that the bill discloses on its face that it is not founded solely upon a diversity of citizenship, but is also based upon Federal questions, to-wit, questions arising under the Acts to Regulate Commerce, approved February 4, 1887, and the amendments

thereto, and under the Acts to Prevent the Unlawful Restraints of Trade and Commerce, and Monopolies, approved July 2, 1890, in which situation each and every one of the defendants can only be sued in the district of their inhabitancy, each and every one of said defendants, as shown by their said plea, being inhabitants of districts in States other than Georgia.

3.

That said Court and Judge erred in not dismissing the bill for want of jurisdiction, over the defendants on the ground that the jurisdiction of the Court was invoked not solely on the ground of citizenship, but also upon Federal questions, and none of the defendants could be sued in any district in the State of Georgia, the same being outside of the district of the inhabitancy of each and all of the defendants.

4.

Because the Court and Judge should have sustained the demurrer interposed by all of the defendants in response to the order to show cause passed July 25th, 1908, upon each and every ground thereof, and should have dismissed the bill.

5.

Because the Court and Judge erred in not dismissing the bill on the ground that there is no equity therein.

6.

Because the Court and Judge erred in not dismissing the bill for want of jurisdiction, it appearing on the face of the record that the Interstate Commerce Commission had not passed on the in-
180 terstate rates complained of, and had not determined such rates to be unreasonable or discriminatory in any respect.

7.

Because the Court and Judge erred in not dismissing the bill for want of jurisdiction on the ground that it is not competent for individuals to bring a suit in equity or at law concerning interstate rates, without some representative of the public being a party to the suit, or without prior action by the Interstate Commerce Commission.

8.

Because the Court and Judge erred in not dismissing the bill for want of jurisdiction on the ground of the lack of indispensably necessary parties.

9.

Because the Court and Judge erred in not dismissing the bill for want of jurisdiction on the ground that no bill in equity can be maintained under the Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, approved July 2nd, 1890, commonly known as the Sherman Anti-Trust Act, except in the name of

the United States, and under the direction of the Attorney General of the United States.

10.

Because the Court and Judge erred in not dismissing the bill for want of jurisdiction on the ground that any action of the Court, in pursuance of the prayer of the bill, was in effect an exercise of the legislative function of fixing *and* [any] maximum rates.

11.

Because the Court and Judge erred in granting a preliminary injunction without requiring bond on the part of complainants.

Wherefore, in order that the foregoing assignment of errors may be and appear of record, the said defendants, and petitioners
181 for appeal herein present the same to the Court and pray that such disposition be made thereof as in accordance with law and the statutes of the United States in such cases made and provided, and further pray that said interlocutory decree of August 3rd, 1908, of the Circuit Court of the United States for the Southern District of Georgia, be reversed and annulled, and that the said Circuit Court be directed to enter an order dismissing the complainants' bill with costs.

ED. BAXTER,
HENRY L. STONE,
CLAUDIAN B. NORTHROP,
EDWARD COLSTON,
W. E. KAY,
GEO. B. ELLIOTT,
JOHN L. TYE,
CLAUDE WALLER,
ROBERT C. ALSTON,
SANDERS McDANIEL,
Solicitors for Petitioners for Appeal and Defendants in the Above Entitled Cause.

(Indorsement:) No. 13. U. S. Circuit Court, Western Division, Southern District of Georgia. Macon Grocery Company, *et al., vs.* Atlantic Coast Line Railway Co. *et al.* Assignment of Errors. Clerk will file. D. A. Pardee, Judge. Filed August 5, 1908. Cecil Morgan, Deputy Clerk.

182 *Order Allowing Appeal and Supersedeas.*

In the Circuit Court of the United States for the Southern District of Georgia, Western Division. In Equity.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITS & COMPANY, F. W. HAZLEHURST COMPANY, ADAMS & JOHNSTON, a Partnership Composed of D. D. Adams and D. T. Adams and C. Y. Johnston; SOLOMON & McREA, a Partnership Composed of W. D. Solomon & D. I. McRea; R. T. BIRDSEY & COMPANY, a Partnership Composed of R. J., J. F. and S. R. Birdsey; GEORGE A. MCARTHUR, PEOPLE'S GROCERY COMPANY, PARKER-WILLIS COMPANY, CORDELE GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S. PENDLETON COMPANY, DALTON GROCERY COMPANY, MARION CURRY, ORR-SMITH GROCERY COMPANY, BRANDON & DRYER, a Partnership Composed of D. S. Brandon and E. Dryer; GALLAHER GROCERY COMPANY, a Partnership Composed of C. D. and H. W. Gallaher, Complainants,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, and CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Defendants.

Order Allowing Appeal.

The above named defendants, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company, have prayed an appeal from the interlocutory order and injunction signed by the Honorable Emory Speer, Judge of said Court, on the 3rd day of August, 1908, in the above entitled cause to the Circuit Court of Appeals for the Fifth Circuit, and the said defendants have presented their petition for appeal simultaneously with an assignment of errors.

Wherefore, it is ordered that an appeal be and the same is hereby allowed to the United States Circuit Court of Appeals for the Fifth Circuit from the interlocutory order and injunction dated the 3rd day of August, 1908, granting a preliminary injunction
183 against the defendants herein, "enjoining them and each of them, jointly and severally, from enforcing collection of the advance in rates made effective August 1st, 1908, from Ohio & Mississippi [river] crossings, Nashville, Tennessee, and points with relation thereto, to all points within the State of Georgia on Classes B, C, D and F, fresh meats, C. L. grain, grain products, hay and packing house products, the said injunction to continue and remain in force pending an investigation and determination of the reasonable-

ness of the rates involved, by the Interstate Commerce Commission, or until the further order of the Court.

And it is further ordered that said interlocutory order and injunction, dated the 3rd day of August, 1908, granting an injunction against said defendants, as aforesaid, be and the same is hereby stayed, superseded and suspended, until the determination of said appeal by the Circuit Court of Appeals for the Fifth Circuit; provided that the appellants enter into an additional bond in which each shall be surety for the others, conditioned to answer to appellees the complaints in the above entitled cause for all damages which said appellees may sustain if said appellants fail to make good this appeal.

And it is further ordered and directed that the petitioners for the appeal execute a bond to the opposite parties in the sum of five hundred and no/100 dollars to answer all cost if they shall fail to sustain their appeal and that a certified transcript of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals for the Fifth Circuit.

Aug. 5th, 1908.

DON A. PARDEE,
Circuit Judge.

[Indorsed:] Circuit Court of the United States for Southern District of Georgia. Macon Grocery Company, *et al.*, *vs.* Atlantic Coast Line Railroad Company, *et al.* Order Allowing Appeal and Supersedeas. Filed Aug. 5th, 1908. Don A. Pardee, Judge. Clerk will file of same date. . Filed August 5th, 1908. Cecil Morgan, Deputy Clerk.

184 *Supersedeas Bond.*

In the Circuit Court of the United States for the Southern District of Georgia, Western Division. In Equity.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITTS & COMPANY, F. W. HAZLEHURST COMPANY, ADAMS & JOHNSTON, a Partnership Composed of D. D. Adams and D. T. Adams and C. Y. Johnston; SOLOMON & McREA, a Partnership Composed of W. D. Solomon and D. I. McRea; R. T. BIRDSEY & COMPANY, a Partnership Composed of R. J., J. F. and S. R. Birdsey; GEORGE A. MCARTHUR, PARKER-WILLIS COMPANY, CORDELE GROCERY COMPANY, PEOPLE'S GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S. PENDLETON COMPANY, DALTON GROCERY COMPANY, MARION CURRY, ORR-SMITH GROCERY COMPANY, BRANDON & DRYER, a Partnership Composed of D. S. Brandon and E. Dryer; GALLAHER GROCERY COMPANY, a Partnership Composed of C. D. and H. W. Gallaher, Complainants,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, SOUTHERN RAILWAY COMPANY, and CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Defendants.

Know all men by these presents, that we, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, Southern Railway Company, and Cincinnati, New Orleans & Texas Pacific Railway Company, as principals and sureties, each for the other, are jointly and severally held and firmly bound unto the above named, the Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merritts & Company, F. W. Hazlehurst Company, Adams & Johnston, a partnership composed of D. D. Adams and D. T. Adams and C. Y. Johnston; Solomon & McRea, a partnership composed of W. D. Solomon and D. I. McRea, R. T. Birdsey & Company, a partnership composed of R. J., J. F. & S. R. Birdsey, George A. McArthur; Peoples Grocery Company, Parker-Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry, Orr-Smith Grocery Company, Brandon
185 & Dryer, a partnership composed of D. S. Brandon and E. Dryer; Gallaher Grocery Company, a partnership composed of C. D. and H. W. Gallaher, their heirs, executors, administrators, assigns and successors, for which payment well and truly to be made we bind ourselves, our assigns and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 5th day of August, in the year of our Lord one thousand nine hundred and eight.

The condition of the above obligation is such that whereas, said Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company have taken an appeal to the Circuit Court of Appeals for the Fifth Circuit, to reverse an interlocutory order continuing an injunction rendered by the Circuit Court of the United States for the Southern District of Georgia, Fifth Judicial Circuit, which order was made and entered in the above entitled cause on the third day of August, 1908.

And, whereas, an additional bond has been required by the order staying, superseding and suspending the said interlocutory order and injunction;

Now, therefore, the condition of the above obligation is such that, if the above named Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, Southern Railway Company, appellants herein, shall answer to appellees, the complainants in the above entitled cause for all damages, which said appellees may sustain if said appellants fail to make good their appeal, then this obligation shall be void, otherwise to remain in full force and effect.

ATLANTIC COAST LINE RAILROAD COMPANY,
By ROBERT C. ALSTON,
Its Attorney and Solicitor,
LOUISVILLE & NASHVILLE R. R. CO.,
By HENRY L. STONE, *General Counsel,*
NASHVILLE, CHATTANOOGA & ST. LOUIS R'Y,
By CLAUDE WALLER,
General Counsel, and
JOHN L. TYE, *Att'y at Law,*
SOUTHERN RAILWAY COMPANY,
By CLAUDIAN B. NORTHROP AND
SANDERS McDANIEL, *Solicitors,*
186 CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By EDWARD COLSTON,
CLAUDIAN B. NORTHROP, AND
SANDERS McDANIEL, *Solicitors,*
Principals and Sureties, Each for the Other.

The within bond is hereby approved, this 5th day of August, 1908.

DON A. PARDEE,
Circuit Judge.

(Indorsement:) No. 13. U. S. Circuit Court, Western Division, So. District of Georgia. Macon Grocery Company, *et al., vs.* Atlantic Coast Line Railway Company, *et al.* Supersedeas Bond. Filed August 5, 1908. Don A. Pardee, Judge. Filed August 5, 1908. Cecil Morgan, Deputy Clerk.

187 *Appeal Bond.*

In the Circuit Court of the United States for the Southern District of Georgia, Western Division Thereof. In Equity.

The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merrits & Company, F. W. Hazlehurst Company, Adams & Johnston, a Partnership Composed of D. D. Adams and D. T. Adams and C. Y. Johnston; Solomon & McRae, a Partnership Composed of W. D. Solomon and D. I. McRae; R. T. Birdsey & Company, a Partnership Composed of R. J., B. F., and S. R. Birdsey; George A. McArthur, People's Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry, Orr-Smith Grocery Company, Brandon & Dryer, a Partnership Composed of D. S. Brandon and E. Dryer; Gallaher Grocery Company, a Partnership Composed of C. D. and H. W. Gallaher, Complainants,

vs.

Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, Southern Railway Company, and Cincinnati, New Orleans & Texas Pacific Railway Company, Defendants.

Know All Men By These Presents: That we, Atlantic Coast Line Railroad Company; Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; Southern Railway Company, and Cincinnati, New Orleans and Texas Pacific Railway Company, as Principals, and The United States Fidelity and Guaranty Company, Baltimore, Md., as surety, are jointly and severally held and firmly bound unto the above named, The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merrits & Company, F. W. Hazlehurst & Company, Adams & Johnston, a partnership composed of D. D. Adams and D. T. Adams, and C. Y. Johnston; Solomon & McRae, a partnership composed of W. D. Solomon and D. I. McRae; R. T. Birdsey & Company, a partnership composed of R. J., J. F., and S. R. Birdsey; George A. McArthur; Peoples Grocery Company; Parker, Willis Company; Cordele Grocery Company; Albany Grocery Company; Tift
188 & Peed Grocery Company; A. S. Pendleton Company; Dalton Grocery Company; Marion Curry; Orr, Smith Grocery

Company; Brandon & Dryer, a partnership composed of D. S. Brandon and E. Dryer; Gallaher Grocery Company, a partnership composed of C. D. and H. W. Gallaher, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said the Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merritts & Company; F. W. Hazlehurst Company; Adams & Johnston, a partnership composed of D. D. Adams and D. T. Adams, and C. Y. Johnston; Solomon & McRae, a partnership composed of W. D. Solomon and D. I. McRae; R. T. Birdsey & Company, a partnership composed of R. J., J. F. and S. R. Birdsey; George A. Mc-thur; Peoples Grocery Company; Parker, Willis Company; Cordele Grocery Company; Albany Grocery Company; Tift & Peed Grocery Company; A. S. Pendleton Company; Dalton Grocery Company; Marion Curry; Orr, Smith Grocery; Brandon & Dryer, a partnership composed of D. S. Brandon and E. Dryer; Gallaher Grocery Company, a partnership composed of C. D. and H. W. Gallagher, their heirs, executors, administrators, assigns and successors, for which payment, well and truly to be made we bind ourselves, our assigns and successors, jointly and severally, firmly, by these presents.

Sealed with our seal, and dated the 5th day of August, in the year of our Lord one thousand nine hundred and eight.

The condition of the above obligation is such that, whereas, said Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company have taken an appeal to the Circuit Court of Appeals for the Fifth Circuit to reverse an interlocutory order, continuing an injunction rendered and entered by the Circuit Court of the United States for the Southern District of Georgia, Fifth Judicial Circuit, which order was made and entered in the above entitled cause on the 5th day of August, 1908.

Now, therefore, the con lition of the above obligation is such that if the above named Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway, Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company, respondents
189 herein, shall answer to said The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, F. W. Hazlehurst Company, Adams & Johnston, a partnership composed of D. D. Adams and D. T. Adams and C. Y. Johnston; Solomon & McRae, a partnership composed of W. D. Solomon and D. I. McRae; R. T. Birdsey & Company, a partnership composed of R. J., J. F. and S. R. Birdsey; George A. McArthur; People's Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry, Orr, Smith Grocery Company; Brandon & Dryer, a partnership composed of D. S. Brandon and E. Dryer; Gallaher Grocery Company, a partnership composed of C. D. and H. W. Gallaher, for all costs if they fail

to sustain their appeal, then this obligation shall be void, otherwise to remain in full force and effect.

ATLANTIC COAST LINE RAILROAD COMPANY, [L. S.]
By ROBERT C. ALSTON,
Its Attorney and Solicitor.
LOUISVILLE & NASHVILLE RAILROAD CO., [L. S.]
By HENRY L. STONE, *General Counsel.*
NASHVILLE, CHATTANOOGA & ST. LOUIS R'Y, [L. S.]
By CLAUDE WALLER, *General Counsel,*
JOHN L. TYE, *Solicitor.*
SOUTHERN RAILWAY COMPANY, [L. S.]
By CLAUDIAN B. NORTHRUP, *Solicitor.*
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By EDWARD COLSTON,
CLAUDIAN B. NORTHRUP,
Solicitors, Principals.
THE UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD., [L. S.]
By FRANK H. REYNOLDS, [SEAL.]
Attorney in Fact, Security.

The within bond is hereby approved this 5th day of August, 1908.

DON A. PARDEE,
Circuit Judge.

190 (Indorsement:) No. 13. U. S. Circuit Court, Western Division, So. District of Georgia. Macon Grocery Company, *et al., vs.* Atlantic Coast Line R'y Co., *et al.* Appeal Bond. Filed August 5th, 1908. Cecil Morgan, Deputy Clerk.

* * * * * * *

191 *Citation on Appeal.*

In the District Court of the United States for the Southern District of Georgia, Western Division Thereof.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITS & COMPANY, F. W. HAZLEHURST, ADAMS & JOHNSTON, a Partnership Composed of D. D. Adams and D. T. Adams and C. Y. Johnston; SOLOMON McRAE, a Partnership Composed of W. D. Solomon and D. I. McRae; R. T. BIRDSEY & COMPANY, a Partnership Composed of R. J. and S. R. Birdsey; GEORGE A. McARTHUR, PEOPLE'S GROCERY COMPANY, PARKER, WILLIS COMPANY, CORDELS GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S PENDLETON COMPANY, DALTON GROCERY COMPANY, MARION CURRY, ORR-SMITH GROCERY COMPANY, BRANDON & DRYER, a Partnership Composed of D. S. Brandon and E. Dryer; GALLAHER GROCERY COMPANY, a Partnership Composed of C. D. & H. W. Gallaher,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, SOUTHERN RAILWAY COMPANY, and CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merrits & Company, F. W. Hazlehurst Company, Adams & Johnston, a partnership composed of D. D. Adams and D. T. Adams and C. Y. Johnston, Solomon & McRae, a partnership composed of W. D. Solomon and D. I. McRae, R. T. Birdsey & Company, a partnership composed of R. J., J. F. and S. R. Birdsey, George A. McArthur, Peoples Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry; Orr, Smith Grocery Company, Brandon & Dryer, a partnership composed of D. S. Brandon and E.
192 Dryer, Gallaher Grocery Company, a partnership composed of C. D. and H. W. Gallaher, and their attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit to be held at *Atlanta* in the State of *Georgia*, within thirty (30) days from the date of this writ, pursuant to an order allowing an appeal entered in the Clerk's office of the Circuit Court of the United States for the Southern District of Georgia, Western Division thereof, wherein Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway,

Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company are appellants and you are appellees, to show cause, if any there be, why the decree and order rendered against the said appellants should not be set aside and the judgment in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties on that behalf.

[SEAL.] Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 5th day of August, 1908.

DON A. PARDEE,
Circuit Judge.

Attest:

CECIL MORGAN,
Deputy Clerk.

In the Circuit Court of the United States for the Southern District of Georgia, Western Division thereof, Macon Grocery Co., *et al.* *vs.* Atlantic Coast Line Railroad Company, *et al.* Citation on Appeal. Filed August 5th, 1908 Cecil Morgan, Deputy Clerk.

A true copy,

_____

Deputy Clerk.

193 *Acknowledgment of Service on Citation.*

In the Circuit Court of the United States for the Southern District of Georgia. In Equity.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITS & COMPANY, F. W. HAZLEHURST COMPANY, ADAMS & JOHNSTON, a Partnership Composed of D. D. Adams and D. T. Adams and C. Y. Johnston; SOLOMON & McRAE, a Partnership Composed of D. W. Solomon and D. I. McRae, R. T. BIRDSEY & COMPANY, a Partnership Composed of R. J., J. F. and S. R. Birdsey; GEORGE A. McARTHUR, PEOPLE'S GROCERY COMPANY, PARKER, WILLIS COMPANY, CORDELE GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S. PENDLETON, DALTON GROCERY COMPANY; MARION CURRY, ORR, SMITH GROCERY COMPANY, BRANDON & DRYER, a Partnership Composed of D. S. Brandon and E. Dryer; GALLAHER GROCERY COMPANY, a Partnership composed of C. D. and H. W. Gallaher,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, SOUTHERN RAILWAY COMPANY, and CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY.

Acknowledgment of Service on Citation.

The above named The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merrits & Company, F. W.

Hazlehurst Company, Adams & Johnston, a partnership composed of D. D. Adams & D. T. Adams and C. Y. Johnston; Solomon and McRae, a partnership composed of W. D. Solomon and D. I. McRae; R. T. Birdsey & Company, a partnership composed of R. J., J. F. and S. R. Birdsey, George A. McArthur, Peoples Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton, Dalton Grocery Company, Marion Curry; Orr, Smith Grocery Company; Brandon & Dryer, a partnership composed of D. S. Brandon & E. Dryer, Gallaher Grocery Company a partnership com-
194 posed of C. D. and H. W. Gallaher, complainants who are the appellees in the above stated cause on appeal to the Circuit Court of Appeals of the United States for the Fifth Judicial Circuit, do hereby acknowledge service of the citation in this cause and waive further notice and service of said citation and appeal.

The Clerk of the Circuit Court of the United States for the Southern District of Georgia is authorized to attach this instrument to the original citation issued in this cause and make the same a part of the record therein.

This 6th day of August, 1908.

WIMBISH, WATKINS & ELLIS,
ALEXANDER AKERMAN,
As Attorneys and Solicitors for all of said Complainants who are Appellees in this Cause.

#1. U. S. Circuit Court for the Southern District of Georgia. Macon Grocery Company *et al. vs.* Atlantic Coast Line Railroad Company, *et al.* Acknowledgment of service on Citation. Filed August 8, 1908. Cecil Morgan, Deputy Clerk.

195 And thereafter the following proceedings were had in said United States Circuit Court of Appeals to-wit:

196 In the United States Circuit Court of Appeals for the Fifth Circuit, October Term, 1908.

No. 1854.

ATLANTIC COAST LINE RAILROAD CO. ET AL., Appellants,
vs.
THE MACON GROCERY COMPANY ET AL., Appellees.

Motion to Vacate Supersedeas and Dismiss Appeal and Brief Thereon.

By Wimbish, Watkins & Ellis, and Akerman & Akerman, Solicitors for Appellees.

W. A. Wimbish, Edgar Watkins, Of Counsel, 525 Prudential Bldg., Atlanta, Ga.
Alexander Akerman, Macon, Ga.

U. S. Circuit Court of Appeals. Filed Sep. 21, 1908. Charles H. Lednum, Clerk.

197 In the United States Circuit Court of Appeals for the Fifth Circuit, October Term, 1908.

No. 1854.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, SOUTHERN RAILWAY COMPANY, and CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, Appellants,

vs.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITTS & COMPANY, F. W. HAZLEHURST COMPANY, ADAMS & JOHNSTON, a Partnership Composed of D. D. Adams and D. T. Adams and C. Y. Johnston; SOLOMAN & McRAE, a Partnership Composed of W. D. Soloman and D. I. McRae; R. T. BIRDSEY & COMPANY, a Partnership Composed of R. J., J. F. and S. R. Birdsey; GEORGE A. MCARTHUR, PEOPLE'S GROCERY COMPANY, PARKER-WILLIS COMPANY, CORDELE GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S. PENDLETON COMPANY, DALTON GROCERY COMPANY, MARION CURRY, ORR-SMITH GROCERY COMPANY, BRANDON & DRYER, a Partnership Composed of D. S. Brandon and E. Dryer; GALLAHER GROCERY COMPANY, a Partnership Composed of C. D. and H. W. Gallaher, Appellees.

198 *Motion to Vacate Order of Supersedeas.*

Come now the appellees in the above styled appeal and respectfully move this Court to vacate and set aside the order of supersedeas granted by the Honorable Don A. Pardee, United States Circuit Judge, herein on August 5, 1908, and for cause in support of this motion say:

This appeal is from an interlocutory decree of the Circuit Court of the Southern District of Georgia, which decree was made August 3, 1908. The decree was made after notice to appellants and full hearing, and was based upon a bill brought by appellees, all citizens of Georgia, resident in the Southern District thereof, against appellants, each a citizen of a State other than Georgia, and with one exception doing business, operating lines of railway, and having offices and agents within the State of Georgia, and, with the exception of one other, so operating in the Southern District thereof.

The bill alleged that appellants, defendants below, had combined and conspired to restrain commerce among the States and as a result of such illegal combination and conspiracy had concurrently and concertedly given notice that they, and each of them, would on August 1, 1908, advance the freight rates from points on the Ohio and Mississippi rivers to all points in Georgia upon food and grain products. That the proposed advance was unjust and unreasonable and would irreparably injure complainants as well as all others

similarly situated, and the public at large. (See bill in transcript.) Tr. 2.

Appellants pleaded to the jurisdiction and demurred, but neither denied the allegations, nor offered any evidence in contradiction thereof. Appellees offered additional evidence in support of their bill. (See Record p. 33.)

199 The Honorable Emory Speer, after notice to appellants, heard the rule to show cause why the injunction should not be granted, at Mount Airy, on July 29th and 30th, he having previously granted a restraining order, and after taking the matter under advisement, delivered his opinion on August 1, 1908, and entered his decree August 3rd. (See Record p. 148.) Appellants were each represented at this hearing. There was no Circuit Judge in the Southern District of Georgia at this time. Judge Speer remained at Mount Airy several days after August 5, 1908.

The order of supersedeas granted by the Honorable Don A. Pardee was granted *ex parte* and without notice to appellees, or their counsel, at Asheville, North Carolina, on August 5, 1908. The order required no surety other than appellants themselves, and fixed no amount of bond for supersedeas. The order as to this point being as follows:

"And it is further ordered that said interlocutory order and injunction, dated the third day of August, 1908, granting an injunction against said defendants, as aforesaid, be and the same is hereby stayed, superseded and suspended, until the determination of said appeal by the Circuit Court of Appeals for the Fifth Circuit; Provided, that the appellants enter into an additional bond in which each shall be surety for the others, conditioned to answer to appellees, the complainants, in the above entitled cause, for all damages which said appellees may sustain if said appellants fail to make good this appeal." (Record p. 183.)

Upon the foregoing statement of facts and the record in this cause and in this Court, appellees say that the supersedeas granted by the Honorable Don A. Pardee, Circuit Judge, should be vacated and set aside upon the following grounds, to-wit:

200 **First.**

Said order is void and of no effect because the same was signed by a circuit judge of the fifth circuit at a place not within the territorial limits of the circuit.

Second.

Because the supersedeas was not taken in accordance with rule thirteen of this court, the signing of the bond therefor by those only who were already jointly and severally bound not being "with good and sufficient security."

Third.

Because the supersedeas was granted *ex parte* and without any notice to appellees or their counsel.

Fourth.

Because under the rules of this court and of courts of equity it is contemplated that only the justice or judge who took part in a decision of the cause may grant a supersedeas.

Fifth.

Because said supersedeas was improvidently granted under the undisputed facts of this cause in this:

That the undisputed facts show that the proposed advance was illegally determined upon, and the notice therefor illegally
201 given, and that such advance was unjust and unreasonable, and would result in irreparable damage to appellees.

Sixth.

That such supersedeas should not have been granted and should now be vacated for that the undisputed facts show that the appellees and the public will suffer irreparable damage from the acts of the appellants, which acts are confessedly illegal, unreasonable and unjust, and by reason of the granting of such supersedeas appellants will be allowed to collect and retain an advance which in this cause they admit is not legal, reasonable or just.

Seventh.

Because the record shows undisputed that appellees, and others similarly situated, will have to pay appellants an illegal exaction of between $500,000 and one million dollars per year, and the order granting the supersedeas provides no surety for the return of said sum, and no adequate protection for appellees.

Wherefore, for the foregoing and other reasons apparent upon the face of the record appellees pray this Honorable Court to vacate, set aside and annul the supersedeas granted by the Honorable Don A. Pardee, United States Circuit Judge, or in the alternative of not granting such order, that this Court now require the appellants to pay into the registry of the United States Circuit Court, for the Southern District of Georgia, all sums collected, or that may
202 be collected, under said advance, pending this appeal, whether in this Court or in the Supreme Court of the United States, and for such other and further security and orders as will, as fully as possible protect the appellees herein.

WIMBISH, WATKINS & ELLIS,
AKERMAN & AKERMAN,
Solicitors, and of Counsel for Appellees.

W. A. WIMBISH,
EDGAR WATKINS,
Of Counsel, 525 Prudential Building, Atlanta, Georgia.

ALEXANDER AKERMAN,
Macon, Georgia.

STATE OF GEORGIA,
County of Bibb:

Personally appeared before the undersigned authority F. W. Hazlehurst, who being duly sworn says that he is an officer of F. W. Hazlehurst Company, one of the appellees herein, that the facts stated in the foregoing motion are true, except as to the statement that the order of supersedeas was signed at Asheville, North Carolina, which fact he believes to be true, such belief being based upon reports sent out by the press and published in newspapers in Georgia.

F. W. HAZLEHURST.

Sworn to and subscribed before me this twenty-ninth day of August, 1908.

[SEAL.]

C. C. McPHAIL,
Notary Public, Bibb County, Ga.

203 In the United States Circuit Court of Appeals for the Fifth Circuit, October Term, 1908.

No. 1854.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, SOUTHERN RAILWAY COMPANY, and CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, Appellants,

vs.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITTS & COMPANY, F. W. HAZLEHURST COMPANY, ADAMS & JOHNSTON, a Partnership Composed of D. D. Adams and D. T. Adams and C. Y. Johnston; SOLOMON & McRAE, a Partnership Composed of W. D. Solomon and D. I. McRae; R. T. BIRDSEY & COMPANY, a Partnership Composed of R. J., J. F., and S. R. Birdsey; GEORGE A. McARTHUR, PEOPLE'S GROCERY COMPANY, PARKER-WILLIS COMPANY, CORDELE GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S. PENDLETON COMPANY, DALTON GROCERY COMPANY, MARION CURRY, ORR-SMITH GROCERY COMPANY, BRANDON & DRYER, a Partnership Composed of D. S. Brandon and E. Dryer; GALLAHER GROCERY COMPANY, a Partnership Composed of C. D. and H. W. Gallaher, Appellees.

204 *Motion to Dismiss Appeal.*

Come now the appellees in the above styled cause and move the Circuit Court of Appeals to dismiss the appeal herein and for cause show:

That this is an appeal from an interlocutory order granted by a Circuit Court enjoining appellants from collecting an illegal, unjust and unreasonable freight rate. The injunction order was granted

after notice and a full hearing. Appellants showing cause only by a plea to the jurisdiction of the persons, and by a demurrer. Proof was offered in support of the bill and no denial was made to the bill, and no evidence offered contradicting its allegations.

That upon a petition for appeal, without notice or hearing, and in the absence of appellees and their counsel, the Honorable Don. A. Pardee, Circuit Judge of the Fifth Judicial Circuit, while at Asheville, North Carolina, and without the territorial limits of the Fifth Circuit, granted this appeal.

Upon the foregoing statement of facts and the record herein appellees move this Court to dismiss this appeal for that:

The order granting the appeal is null and void because the Honorable Don A. Pardee, who made such order, had no authority or power to make this or any other order unless all parties agreed thereto, while outside of the territorial limits of the Fifth Circuit, of which Circuit he is a Circuit Judge, and in which Circuit the order appealed from was granted.

205 Wherefore, appellees pray that this appeal be dismissed with such other orders as may be appropriate.

WIMBISH, WATKINS & ELLIS,
AKERMAN & AKERMAN,
Solicitors, and of Counsel for Appellees.

W. A. WIMBISH,
EDGAR WATKINS,
Of Counsel, 525 Prudential Building, Atlanta, Georgia.
ALEXANDER AKERMAN,
Macon, Georgia.

STATE OF GEORGIA,
County of Bibb:

Personally appeared before the undersigned authority F. W. Hazlehurst, who being duly sworn says that he is an officer of F. W. Hazlehurst Company, one of the appellees herein, that the facts stated in the foregoing motion are true, except as to the statement that the order for appeal was signed at Asheville, North Carolina, which fact he believes to be true, such belief being based upon reports sent out by the press and published in newspapers in Georgia.

F. W. HAZLEHURST.

Sworn to and subscribed before me this twenty-ninth day of August, 1908.

[SEAL.]

C. C. McPHAIL,
Notary Public, Bibb County, Ga.

206 Service of the foregoing motion accepted and receipt of copy acknowledged. This first day of September, 1908.

McDANIEL, ALSTON & BLACK,
Counsel for Atlantic Coast Line Railroad Co. and Southern Railway Co., of Counsel for Appellants.

207 In the United States Circuit Court of Appeals for the Fifth Circuit, October Term, 1908.

No. 1854.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, SOUTHERN RAILWAY COMPANY, and CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, Appellants,

vs.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITTS & COMPANY, F. W. HAZLEHURST COMPANY, ADAMS & JOHNSTON, a Partnership Composed of D. D. Adams and D. T. Adams and C. Y. Johnston; SOLOMON & McRAE, a Partnership Composed of W. D. Solomon and D. I. McRae; R. T. BIRDSEY & COMPANY, a Partnership Composed of R. J., J. F., and S. R. Birdsey; GEORGE A. MCARTHUR, PEOPLE'S GROCERY COMPANY, PARKER-WILLIS COMPANY, CORDELE GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S. PENDLETON COMPANY, DALTON GROCERY COMPANY, MARION CURRY, ORR-SMITH GROCERY COMPANY, BRANDON & DRYER, a Partnership Composed of D. S. Brandon and E. Dryer; GALLAHER GROCERY COMPANY, a Partnership Composed of C. D. and H. W. Gallaher, Appellees.

208 *Appellees' Brief on Motions to Vacate Supersedeas and Dismiss Appeal.*

In support of the foregoing motions appellees beg leave to submit this

Brief.

First Ground.

This ground is based upon the proposition that a United States circuit judge has no authority or power to grant a supersedeas in any cause when he is not within the territorial limits of his circuit.

Whether Section 7 of the Act of March 3, 1891, as amended and construed with Equity Rule 93, authorizes a Circuit Judge who did not "take part in the decision of the cause" to grant a supersedeas at the time of taking an appeal, or whether or not that law contemplates that a supersedeas must be granted at a subsequent time and "during the pendency of such appeal," we need not now discuss.

Act March 3, 1891, 26 Stat. L. 828.
Amended Act Feb. 18, 1905, 28 Stat. L. 666.
Amended Act June 6, 1900, 31 Stat. L. 660.
Amended Act April 14, 1906, 34 Stat. L. 116.
4 Fed. Stat. An. 422-3.

Certain it is that the territorial jurisdiction of the Circuit Judge was not thereby enlarged. Circuit Judges are appointed for certain Circuits and are given no power outside of such Circuits.

R. S. U. S. Sec. 607.

209 The territorial limits of each judicial Circuit or District is clearly defined.

R. S. U. S. 604.

While the Judges of the Supreme Court are Judges throughout the United States, Congress has seen fit to require that they, under some circumstances, and when acting as Circuit Justices, shall come within the territorial limits of the Circuit in which the cause of action is pending.

R. S. U. S. 719.

Mr. Justice Bradley as Circuit Justice in a case pending in this Circuit said:

"It is literally true that they (the Circuit Judges) cannot hear such applications (for injunction) when outside of their Circuits."

2 Woods 621, 623.

The power to stay and supersede an injunction is equally as great as the power to grant one, and the law does not say in the one case any more than in the other that the power may be exercised by Circuit Judges "when outside of their Circuits."

Circuit Judge Sawyer, with whom concurred District Judge Sabin, described the Judge's Chamber as "on the street," "in the Judge's own house," "at the hotel," or even "In transitu on the cars," but he limits all these places "within the proper jurisdiction to hold court." *In re* Neagle, 39 Fed. 855. On page 856 of the opinion Judge Sawyer further says:

"For the purpose of jurisdiction the chambers of a Judge are wherever he happens to be in his Circuit or District."

210 The American and English Encyclopedia of Law, Vol. 17, page 724, contains this text:

"The jurisdiction of a Judge at Chambers being limited to that of the Court itself, it follows that such jurisdiction cannot go beyond the jurisdiction of the Court to which such Judge belongs."

The Supreme Court in a case from this Circuit, where an injunction had been granted, and a receiver appointed outside the Circuit and "the order transmitted by the Circuit Judge by letter" to the Clerk of the Court said:

"We *must* not be understood as intimating an opinion that a *Circuit Judge* has no power to grant injunctions, appoint receivers *or enter orders* or decrees, *in invitum*, outside of his Circuit." (Italics ours.) Tampa Suburban R. Co., 168 U. S. 583, 42 L. Ed. 589.

If the eminent Circuit Judge who granted this supersedeas could make the order on an *ex parte* hearing without notice at Asheville, North Carolina, he could make such order at any other place outside the Fifth Circuit. This order, being as far as appellees are con-

cerned, "*in invitum*," we respectfully insist is literally *coram non judice*.

Second.

The order of supersedeas is not in conformity with the rules of this Court.

By the admitted and proven allegations of the bill appellants are joint tort feasors, and as such jointly and severally liable to appellees for such damages as may result from the collection by appellants of the illegal, unjust and unreasonable advance. This advance may reach one million dollars per annum, and certainly will seriously affect every person in Georgia.

The bond required in the order of supersedeas does not one whit enlarge the legal liability of appellants, and therefore the
211 order is equivalent to a supersedeas without any bond, and without any kind of security "good," "sufficient," or otherwise.

The Preston 93 Fed. 522.
Rule 13, Circuit Court of Appeals.

Third.

The staying of an injunction order pending appeal not being a matter of right, the opposite party should have notice and an opportunity to be heard before the granting of such stay.

That the supersedeas is not a matter of absolute right is held by the Supreme Court.

Re Haberman Mfg. Co. 147 U. S. 525; 37 La. Ed. 266.

The question of whether the supersedeas should be granted resting in the sound legal discretion of him who may grant it, requires an investigation and knowledge of the facts, and an understanding of the reasons for the injunction and the damages that might flow from its continuance or dissolution. In this investigation, especially if undertaken by one who did not "take part in the decision of the cause," the whole record should be presented, and the Judge should have the benefit of the argument of both sides, to the end that he might the better exercise that discretion which is not arbitrary but judicial. In the United States the word "judicial" connotes "notice and hearing."

"Notice must be given to the other side of any application to stay execution under a decision that is appealed from."

Mews' Digest of English Case Law, Vol. 1, p. 441, and cases cited.

Tidd's practice 487-8 states the practice as being to issue a
212 rule *nisi* to show cause why supersedeas should not issue.

The Supreme Court because of the necessity of examining the record leaves to the trial judges, who have heard all the facts

and argument on the law, the right to supersede an injunction order.

Equity Rule 93.
Leonard *v.* Ozark Land Co., 115 U. S. 465, 468.

See also
Interstate Com. Com. *v.* Southern Pac. Co., 137 Fed. 606, where a "notice to supersede decree" was required.

Fourth.

Under the rules in Equity and of this Court it is contemplated that only a judge who "took part in the decision" should act on a motion for supersedeas.

Equity Rule 93.
Rule Court Appeals 13.
Leonard *v.* Ozark Land Co., 115 U. S. 465, 468.
Mews' Digest Vol. 1, p. 440.
Daniels' Chan. Prac. Vol. 2, p. 1470.

Rule 13 of this Court, while not so specific as Equity Rule 93, evidently contemplates that supersedeas bonds "must be taken" "in the Circuit and District Courts," and in paragraph 2 of Rule 13 it is said the bond filed is to be in "such sum as such Court (Circuit or District) shall direct."

213 While Section 7 of the Act of 1891 may give the power to the Appellate Court, or a Judge thereof, to stay proceedings in a case like this, the necessity on the part of that Court or Judge to examine the record, and the time required so to do, made it expedient as held by the Supreme Court in Leonard *v.* Ozark Land Co., *supra*, to promulgate Equity Rule 93, and we may presume the same reason caused the promulgation of Rule 13 of this Court.

Union Pac. R. Co. *v.* Calleghan, 161 U. S. 91, 40, L. Ed. 628.
American Strawboard Co. *v.* Indianapolis Water Co., 81 Fed. 423.

Fifth, Sixth, and Seventh Grounds of Motion.

Under the facts shown by the record in this cause no supersedeas should have been granted by any Court or Judge.

Upon petition in Interstate Com. Com. *v.* Louisville & N. R. Co., 101 Fed. 146, it was held after argument by brief and oral argument that the Judge "who took part in the decision of the cause" might grant a supersedeas, but there an order was made that gave some protection to the complainants.

Judge Wellborn, the Judge who granted the injunction in Commission *v.* Southern Pac. Co., 137 Fed. 606, 608, states the proposition as follows:

"This brings me to the question whether or not the pending motion presents a case calling for the exercise of said discretion (that given by Equity Rule 93). In order to justify the exercise of the discretion, or, stating the matter concretely, in order to justify the

suspension of the decree in this case, it should be made to appear, first, that irremediable loss will result to the defendants, during the pendency of the proposed appeal, from the enforcement of the decree; and, second, that no such loss will result to the complainants from its suspension."

214 Applying this rule to the instant case it appears from the undisputed facts in the bill and the evidence adduced by complainants that the proposed advance is not only illegal in its inception, but unjust and unreasonable and therefore illegal both at common law and under the Interstate Commerce Law. Appellants could not therefore suffer damage by being restrained from doing what, in law and good conscience, they could not do. On the contrary, appellees and those whom they represent will, under the undisputed facts, suffer loss to the extent of possibly a million dollars per annum, and while by a multitude and multiplicity of suits, after long litigation, they may recover the amount of overcharge paid by them, they can never recover adequate compensation for their loss and the derangement of their business, nor is there any protection whatever to the public, all of whom must eat, and each one who eats must contribute part of this illegal, unjust and unreasonable charge to the coffers of appellants.

Judge Wellborn, p. 609, further says:

"It has not been made to appear that the damage to defendants will be any greater from the enforcement of the decree than would be the damage to the shippers from its suspension, and this view of tthe case is conclusive agains- the suspension of the decree."

In the Tift case, record p. 1238, cause No. 1495, in this Court, 148 Fed. 1021 on July 8, 1905, the trial court on petition and hearing granted a supersedeas with bond in the sum of $500,000 with two surety companies as sureties, yet the records of this Court show how inadequate was this carefully prepared order to protect the shippers who are yet striving to collect that which every Court, considering the matter, has adjudged to be an illegal exaction.

Tift *v.* Southern Ry. Co., 123 Fed. 789, 10 I. C. C. R. 548, 138 Fed. 758.

215 Southern Ry. Co. *v.* Tift, 148 Fed. 1021, 206 U. S. 428, 51 L. Ed. 1124.

Tift *v.* Southern Ry. Co. 159 Fed. 555.

Phillips *v.* Southern Ry. Co. 14 I. C. C. R. 199.

Southern Pine Lumber Co. *v.* Southern Railway Co. 14 I. C. C. R. 195.

Southern Ry. Co. *v.* Tift, now pending in this Court; and the opinions of the Court below in this case.

In this case all the defendants except the Cincinnati, New Orleans & Texas Pacific Railway Company had offices and agents who could be served within the State of Georgia, and all the remaining defendants except the Nashville, Chattanooga & St. Louis Railway Company could be served within the Southern District of Georgia.

The only defendant that could not be reached in the State was made a party defendant under Equity Rule 22, and was not com-

pelled to submit itself to the jurisdiction of the Court. It voluntarily came in, however, and filed the same kind of an appearance as those defendants within the jurisdiction of the Court.

The only question raised was one of jurisdiction over the parties and over the subject matter, and after full argument this question was determined against the defendants, appellants here. Under the authorities herein cited we insist that on an application for appeal and supersedeas the question of jurisdiction, especially the jurisdiction of a court of equity, is not to be decided, this being a question not for the Judge granting the appeal but for the court to which the appeal is taken. If we be correct in this position, then the Judge granting an appeal and staying the proceedings will, of he have authority in the premises, exercise his discretion upon the assumption that jurisdiction existed in the trial court. Such a construction of the law is consistent with the general principles governing appeals and any other construction would allow a Circuit Judge, one
216 member of an Appellate Court, to nullify an order granted by another Judge, who, in granting the relief, was acting as and with the power of a Circuit Judge.

Under the law as appellees contend it is, the judicial discretion should not be so exercised as to deprive a complainant of the protection of an injunction order obtained on an undisputed bill showing that unless the injunction be granted complainants will suffer irreparable damage.

Respectfully submitted,

WIMBISH, WATKINS & ELLIS,
Solicitors for Appellees.

W. A. WIMBISH,
EDGAR WATKINS,
Of Counsel, 525 Prudential Building, Atlanta, Georgia.
ALEXANDER AKERMAN,
Of Counsel, Macon Georgia.

Service of the foregoing motion and brief accepted and receipt of copy acknowledged. This September 1, 1908.

McDANIEL, ALSTON & BLACK,
Counsel for Atlantic Coast Line Railroad Co. and Southern Railway Co., Solicitors for Appellants.

NOTE.—The original motions and brief in support thereof were filed in the Circuit Court of Appeals September 3, 1908. The brief on the motion to dismiss the appeal being the same as the foregoing brief on the first ground of the motion to vacate the supersedeas, is not printed.

217 *Acceptance of Service of Motions.*

In the United States Circuit Court of Appeals for the Fifth Circuit, October Term, 1908.

No. 1854.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL., Appellants,
vs.
THE MACON GROCERY COMPANY ET AL., Appellees.

Service of copy of the motion to vacate supersedeas, motion to dismiss appeal, and brief thereon accepted, and receipt of copies thereof acknowledged; and notice of the intention to hear said motion in the United States Circuit Court of Appeals at Atlanta, Georgia on October 5th, 1908, also acknowledged.

W. E. KAY,
McDANIEL, ALSTON & BLACK,
Solicitors Atlantic Coast Line Railroad Co.
HENRY L. STONE,
JOHN L. TYE,
Solicitors Louisville & Nashville Railroad Co.
CLAUDE WALLER,
JOHN L. TYE,
Solicitors Nashville, Chattanooga & St. Louis Railway.
C. B. NORTHROP,
McDANIEL, ALSTON & BLACK,
Solicitors Southern Railway Co.
C. B. NORTHROP,
McDANIEL, ALSTON & BLACK,
Solicitors Cincinnati, New Orleans & Texas Pacific Railway Co.

218 The foregoing has the following indorsements to-wit:
No. 1854. In the United States Circuit Court of Appeals. Atlantic Coast Line Railroad Co. *et al. vs.* Macon Grocery Co. *et al.* Acceptance of Service of Motions & Briefs thereon. U. S. Circuit Court of Appeals Filed Sep. 21, 1908. Charles H. Lednum, Clerk.

219 *Transcript of Record.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 1854.

ATLANTIC COAST LINE RAILROAD CO. ET AL., Appellants,
versus
MACON GROCERY CO. ET AL., Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

(*Stipulation.*)

[Original Record Filed September 21, 1908.]

U. S. Circuit Court of Appeals. Filed Sep. 24, 1908.
CHARLES H. LEDNUM, *Clerk.*

220 United States Circuit Court of Appeals, Fifth Circuit, October Term, 1908.

No. 1854.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL., Appellants,
versus
MACON GROCERY COMPANY ET AL., Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Stipulation.

It appearing from the printed transcript of the record herein that the demurrers of the appellees, complainants in the Court below, filed to the several pleas of the appellants, defendants in the Court below, to the jurisdiction of the Court over the persons of the defendants, and which demurrers were sustained by the Court when said pleas were overruled, as shown by the printed record (pp. 145-147), it is now stipulated and agreed between counsel for appellants and appellees that the said demurrer to the plea to the jurisdiction filed by the appellant, Louisville & Nashville Railroad Company, was as follows:

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia. In Equity.

MACON GROCERY COMPANY ET AL.
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

The Demurrer of Complainants to the Plea to the Jurisdiction of the Defendant Louisville & Nashville Railroad Company.

Now come the complainants in the above entitled cause, by protestation, et cetera, and demur to the plea to the jurisdiction,
221 filed herein by the defendant, Louisville & Nashville Railroad Company, and for cause of demurrer show: That the controversy presented by the bill is wholly between citizens of different States, and is solely founded upon diversity of citizenship; and that the Court has jurisdiction thereof.

WIMBISH, WATKINS & ELLIS,
ALEXANDER AKERMAN,
Solicitors for Complainants.

It is further stipulated and agreed that the demurrers to the several pleas filed by the other appellants and defendants in the Court below were in the same form and substance as that to the plea of the appellant, Louisville & Nashville Railroad Company, as above set forth.

In witness whereof, we have hereunto signed our names as counsel aforesaid this 19 day of September, 1908.

HENRY L. STONE,
C. B. NORTHROP,
McDANIEL, ALSTON & BLACK,
TYE, PEOPLES, BRYAN & JURD,
EDWARD BAXTER,
Solicitors for Appellants.
WIMBISH, WATKINS & ELLIS,
AKERMAN & AKERMAN,
Solicitors for Appellees.

UNITED STATES OF AMERICA,
Western Division, Southern District of Georgia, ss:

I, Cecil Morgan, Deputy Clerk of the Circuit Court of the United States of America, for the Southern District of Georgia, do hereby certify that the writing annexed to this certificate are true copies of their respective original now on file, and remaining on record in my office. To-wit: Demurrer, Citation and acknowledgment thereon, *In Re:* The Macon Grocery Company, *et al., vs.* The Atlantic Coast Line Railroad Company, *et al.*

In witness whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Macon, in the Southern District of

Georgia, this 19th day of September, in the year of our Lord, one thousand nine hundred and eight, and of the Independence of the United States, the one hundred and thirty-second.

[SEAL.] CECIL MORGAN,
Deputy Clerk.

222 *The Demurrer of the Defendants, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway Company, and Cincinnati, New Orleans & Texas Pacific Railway Company.*

In the Circuit Court of the United States for the Southern District of Georgia, at Macon.

MACON GROCERY COMPANY ET AL., Complainants,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL., Defendants.

The defendants, by protestation, not confessing or acknowledging, all or any of the matters and things in the said complainant's bill of complaint to be true in such manner and form as the same are therein set forth and alleged, and without waiving their pleas to the jurisdiction of the Court over the defendants or either of them, heretofore overruled and to which the complainant's demurrers have been sustained by the Court, but still relying and insisting on their said pleas, do demur thereto, and for cause of demurrer show that the complainants have not, nor has either of them, in and by virtue of their said bill of complaint, made or stated any such cause of actions as is within the jurisdiction of this Court or as doth or ought to entitle them to any relief in this Court of Equity, or to any such relief as is therein sought and prayed for:

I. It appears by the allegations of said bill of complaint this Court has no jurisdiction of these defendants or either of them.

II. The facts stated in said bill of complaint show no cause of action of which the Circuit Court of the United States for the Southern District of Georgia has jurisdiction in equity, and there is no equity in the said bill.

III. It is not competent for any of the complainants or any individuals or individual having dealings with the Railway Companies to raise the question in the courts as to the rates of charge for interstate transportation described in the bill of complaint, (the same having been established by law), without some representative of the public being a party to the record, or without the
223 Interstate Commerce Commission having passed upon the said rates in the first instance, as provided by the Act to Regulate Commerce.

IV. It appears from the allegations in said bill of complaint that the complainants have not made or stated such cause of action as entitles them or either of them to the relief that is herein sought and

prayed for against these defendants or either of them in a Court of Equity of the United States.

V. It does not appear from the allegations in said bill of complaint that the same is instituted or filed under or by authority of any statute of the United States, and the same does not set forth facts showing that the complainants or either of them are entitled to maintain any bill of complaint in equity against these defendants or either of them under any law or act of the Congress of the United States.

VI. It appears from and upon the face of said bill of complaint that the said complainants have each an adequate and complete remedy at law, for the several alleged wrongs in said bill of complaint set up against these defendants and each of them.

VII. It appears from the allegations of said bill of complaint that the Interstate Commerce Commission under and by virtue of the provisions of "An Act to Regulate Commerce," approved February 4th, 1887, and the amendments thereto, has original and exclusive jurisdiction of the matters and things set up and complained of in said bill of complaint, except those mentioned in the next paragraph of this demurrer.

VIII. It appears by the allegations of the said bill of complaint and upon the face thereof that, in so far as the same is brought to restrain and enjoin an alleged contract, combination, or conspiracy by or between defendants, alleged to be in restraint of trade or commerce among the several States, or alleged to have been made by or between the defendants to monopolize or as an attempt on their part to monopolize any such trade or commerce to any extent, in alleged contravention of "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," approved July 2d, 1880, commonly known as the Sherman Anti-Trust Act, neither the complainants, or either of them, nor any other individuals or
224 corporations, have any cause of action or right to institute or maintain any action to obtain any relief in equity, or in any Court of Equity, such right of action being vested exclusively in the United States, to be instituted by the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, and not otherwise, and all individuals and corporations are restricted to their remedies at law as provided in said Act.

IX. The allegations in said bill of complaint do not show that the complainants or either of them are entitled to institute or maintain this action against these defendants or either of them under or by virtue of an "Act to Regulate Commerce," approved February 4th, 1887, and the amendments thereto.

X. The granting of the injunction sought and prayed for in said bill of complaint would be in effect to fix at existing or prevailing maximum rates, the rates to be charged by defendants and each of them on August 1st, 1908, and thereafter upon the classes of freight and commodities from and to the points stated in said bill of complaint, thus usurping the power and right committed to the defendant carriers to fix and publish schedules and tariffs of their rates

upon such classes and commodities from and to the points aforesaid and file the same with the InterState Commerce Commission, in the manner provided by said "Act to Regulate Commerce," and the amendments thereto, subject to the power of said Commission, on a complaint made, after full hearing, as therein provided, to prescribe what will be just and reasonable rates to be thereafter observed in such case or for like services, as the maximum to be charged, should said Commission be of opinion the rates or charges complained of are unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial, otherwise in violation of any of the provisions of the said act or the amendments thereto, and to award against the offending carriers or carrier reparation in damages to the complainant or complainants for such violation as provided in such act as amended; and to grant the relief as prayed for by complainants would be the exercise by this Court of legislative, and not judicial power, and to pass such a decree is and would be beyond the power, authority, and jurisdiction of this Court.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, these defendants demur thereto and humbly demand the judgment of this Court whether they
225 shall be compelled to make any further or any other answer to said bill, and pray to be dismissed with their costs and charges in this behalf most wrongfully sustained.

(Signed) ED. BAXTER,
JOHN L. TYE,
J. D. B. DE BOW,
CLAUDIUS B. NORTHRUP,
EDWARD COLSTON,
HENRY L. STONE,
GEO. B. ELLIOTT,
McDANIEL, ALSTON & BLACK,
Solicitors for Defendants.

UNITED STATES OF AMERICA,
State of Kentucky, County of Jefferson, ss:

G. E. Evans appeared before me and makes solemn oath, and says that he is Fourth Vice-President of the Louisville & Nashville Railroad Company, one of the defendants, and that the foregoing demurrer is not interposed for delay.

(Signed) G. E. EVANS,
Fourth Vice President.

Subscribed and sworn to before me, as witness my hand and official seal, this 27th day of July, 1908. My commission expires on the 29th day of January, 1910.

[SEAL.] (Signed) G. W. OLMSTEAD,
Notary Public for Jefferson County, Ky.

I do hereby certify that in my opinion the foregoing demurrer is well grounded in point of law.

[SEAL.] (Signed) ED. BAXTER,
Of Counsel for Defendants.

(Indorsements:) No. 590. In the Circuit Court of the United States for the Southern District of Georgia, at Macon. Macon Grocery Company, *et al.*, *vs.* Atlantic Coast Line Railroad Company, *et al.* Demurrer of the Atlantic Coast Line Railroad Company, *et al.* Filed August 6th, 1908. Cecil Morgan, Deputy Clerk.

* * * * * * *

226 *Order Designating Judge.*

October Term, 1908.

OCT. 6, 1908.

(Extract from Minutes.)

No. 1854.

ATLANTIC COAST LINE RAILROAD COMPANY
vs.
THE MACON GROCERY COMPANY ET AL.

Ordered that Honorable William T. Newman, United States District Judge for the Northern District of Georgia, be, and he is hereby designated to sit in place of Honorable Don. A. Pardee, Circuit Judge, in this case, on the hearing of the motion to vacate supersedeas and dismiss appeal.

Argument and Submission of Motions.

October Term, 1908.

OCT. 6, 1908.

(Extract from Minutes.)

No. 1854.

ATLANTIC COAST LINE R. R. CO. ET AL.
vs.
THE MACON GROCERY CO. ET AL.

On this day came on to be heard the motions to vacate supersedeas and dismiss appeal in this cause, and after argument by Edgar Watkins, Esq., for, and C. B. Northrop, Esq., and H. L. Stone, Esq., against, was submitted to the court.

227 *Stipulation to Transfer.*

In the United States Circuit Court of Appeals for the Fifth Circuit, October Term, 1908.

No. 1854.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL., Appellants,
vs.
THE MACON GROCERY COMPANY ET AL., Appellees.

In the event the motions made by appellees herein are overruled it is hereby stipulated and agreed between counsel for Appellants and Appellees that this case be reassigned for hearing on the merits at New Orleans, La., at some date in the fore part of November, 1908, satisfactory to this Court.

This October 6th, 1908.

HENRY L. STONE,
CLAUDIAN B. NORTHRUP.
Counsel for Appellants.
W. A. WIMBISH,
EDGAR WATKINS,
Counsel for Appellees.

The foregoing has the following indorsements to-wit:

No. 1854. Atlantic Coast Line R. R. Co. *et al., vs.* Macon Grocery Co. *et al.* Stipulation to transfer to New Orleans. U. S. Circuit Court of Appeals. Filed Oct. 6, 1908. Charles H. Lednum, Clerk.

228 *Order on Motions.*

October Term, 1908.

OCT. 8, 1908.

(Extract from Minutes.)

No. 1854.

ATLANTIC COAST LINE RAILROAD CO. ET AL., Appellants,
vs.
THE MACON GROCERY COMPANY ET AL., Appellees.

Motion to Dismiss Appeal and to Vacate Order of Supersedeas.

Before Shelby, Circuit Judge, and Newman and Burns, District Judge.

After argument had upon the motion to dismiss the appeal in this case, and upon consideration thereof, it is ordered and adjudged that the said motion be, and the same is hereby denied.

It is further ordered, adjudged and decreed that the motion to vacate the supersedeas granted by Honorable Don A. Pardee, Circuit Judge, be denied and the supersedeas as it now stands on the record be continued in force, upon the defendants in the Circuit Court, (appellants here) entering into a bond in the sum of One Hundred Thousand ($100,000) Dollars, conditioned to answer to appellees (The complainants in the case) and all parties at interest who may intervene in this cause, for all loss and damages they may sustain by reason of the increase in rates in question here, if said appellants fail to make good this appeal. The bond named to be filed within ten days from this date, with good and sufficient sureties to be approved by this court.

It is further ordered that the original of said bond when presented and approved, shall be transmitted by the clerk of this court to the clerk of the Circuit Court for the Southern District of Georgia, and a copy retained here as a part of the record in this court.

Counsel consenting that this case shall be heard at New Orleans it is now ordered that the same be assigned for hearing on November 11th, 1908.

229 *Supersedeas Bond.*

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 1854.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, SOUTHERN RAILWAY COMPANY, and CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Appellants,

vs.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITTS & COMPANY, F. W. HAZLEHURST COMPANY, ADAMS & JOHNSTON, a Partnership Composed of D. D. Adams and D. T. Adams and C. Y. Johnston; SOLOMON & McRAE, a Partnership Composed of W. D. Solomon and D. I. McRae; R. T. BIRDSEY & COMPANY, a Partnership Composed of R. J., B. F., & S. R. Birdsey; GEORGE A. McARTHUR, PEOPLE'S GROCERY COMPANY, PARKER, WILLIS COMPANY, CORDELE GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S. PENDLETON COMPANY, DALTON GROCERY COMPANY, MARION CURRY, ORR-SMITH GROCERY COMPANY, BRANDON & DRYER, a Partnership Composed of D. S. Brandon and E. Dryer; GALLAHER GROCERY COMPANY, a Partnership Composed of C. D. and H. W. Gallaher, Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Know all men by these presents:—That we, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company, de-

fendants in the Circuit Court and appellants here, as principals, and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, as surety, are jointly and severally held and firmly bound unto
the above named The Macon Grocery Company, A. B. Small
230 Company, Adams Brothers Company, Merritts & Company, F. W. Hazlehurst Company, Adams & Johnston, a partnership composed of D. D. Adams and D. T. Adams and C. Y. Johnston; Solomon & McRae, a partnership composed of W. D. Solomon and D. I. McRae; R. T. Birdsey, & Company, a partnership composed of R. J., B. F. and S. R. Birdsey; George A. McArthur, People's Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry, Orr-Smith Grocery Company, Brandon & Dryer, a partnership composed of D. S. Brandon and E. Dryer; Gallaher Grocery Company, a partnership composed of C. D. Gallaher and H. W. Gallaher, complainants in the Circuit Court and appellees here, their heirs, executors, administrators, assigns and successors in the sum of One Hundred Thousand (100,000.00) Dollars, for the payment of which well and truly to be made we bind ourselves, our assigns and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of October in the year of Our Lord One Thousand Nine Hundred and Eight.

The condition of the above obligation is such that whereas an appeal was taken by the said Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company to reverse an interlocutory order continuing an injunction rendered and entered by the Circuit Court of the United States for the Southern District of Georgia, Fifth Judicial Circuit, which order was made and entered on the third day of August, 1908;

And whereas said appeal is now pending in the said United States Circuit Court of Appeals for the Fifth Circuit;

And whereas at the time of the allowance of said appeal by the Honorable Don A. Pardee, Circuit Judge, a supersedeas was granted by him staying, superseding and suspending said interlocutory order
of the Circuit Court and injunction granted by Honorable
231 Emory Speer on the third (3rd) day of August, 1908;

And whereas the above named appellees subsequent to the allowance of said appeal and the grant of said supersedeas filed in the United States Circuit Court of Appeals, Fifth Circuit a motion to vacate said supersedeas;

And whereas said motion was heard and considered by said United States Circuit Court of Appeals for the Fifth Circuit;

And whereas said Appellate Court did on the 8th day of October, 1908, pass an order denying the motion to vacate said supersedeas and continuing the same in force upon certain conditions named in said order;

Now, therefore, the condition of the above obligation is such that if the above named Atlantic Coast Line Railroad Company, Louis-

ville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company, appellants, shall answer to The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merritts & Company, F. W. Hazlehurst Company, Adams & Johnston, a partnership composed of D. D. Adams and D. T. Adams and C. Y. Johnston; Solomon & McRae, a partnership composed of W. D. Solomon & D. I. McRae; R. T. Birdsey & Company, a partnership composed of R. J., B. F. and S. R. Birdsey; George A. McArthur; People's Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry, Orr-Smith Grocery Company, Brandon & Dryer, a partnership composed of D. S. Brandon and E. Dryer; Gallaher Grocery Company, a partnership composed of C. D. and H. W. Gallaher, appellees (the complainants in the case) and all parties at interest who may intervene in this cause for all loss and damages they may sustain by reason of the increase in rates complained of in the Circuit Court and in question
232 here, and otherwise fully comply with said order of October 8th, 1908, if said Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company, appellants, fail to make good their appeal, then this obligation shall be void; otherwise to remain in full force and effect.

ATLANTIC COAST LINE RAILROAD COMPANY, [L. S.]
By ROB'T C. ALSTON,
Its Solicitor & Counsel.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, [L. S.]
By JOHN L. TYE,
Solicitor & Counsel.
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, [L. S.]
By JOHN L. TYE,
Solicitor & Counsel.
SOUTHERN RAILWAY COMPANY, [L. S.]
By SANDERS McDANIEL,
Its Solicitor & Counsel.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, [L. S.]
By SANDERS McDANIEL,
Its Solicitor.
Principals.
THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, [L. S.]
By FRANK H. REYNOLDS,
Att'y in fact.
Security.

The security upon the foregoing bond is accepted and said bond is approved as good and sufficient and as complying fully with the order of this Court of the 8th day of October, 1908, denying the motion to vacate the supersedeas in the case.

——— ———.

233 The foregoing has the following indorsements to-wit: No. 1854. Atlantic Coast Line R. R. Co. *et al., versus* Macon Grocery Co. *et al.* Supersedeas Bond. Filed 13 day of Oct. 1908. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals. McDaniel, Alston & Black, Attorneys and Counsellors at Law, Atlanta, Ga.

234 *Order Approving Bond.*

October Term, 1908.

Oct. 13, 1908.

(Extract from Minutes.)

No. 1854.

Atlantic Coast Line Railroad Company et al.
vs.
Macon Grocery Company et al.

On this day the appellants herein and defendants in the Circuit Court, pursuant to the order of this court of date October 8th, 1908, presented to this court their bond in the sum of One Hundred Thousand ($100,000) Dollars with the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety and it appearing to the court that said bond is in due form and the surety sufficient it is ordered that said bond be, and it is hereby, approved.

235 *Argument & Submission.*

November Term, 1908.

Nov. 10, 1908.

(Extract from Minutes.)

No. 1854.

Atlantic Coast Line Railroad Company et al.
vs.
The Macon Grocery Co. et al.

On this day this cause was regularly called, and after argument by H. L. Stone, Esq., for appellants, and W. A. Wimbish, Esq., for appellees, was continued until next Monday.

Nov. 14, 1908.

No. 1854.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL.
vs.
THE MACON GROCERY CO. ET AL.

On this day this cause was called for further hearing, and after argument by C. B. Northrop, Esq., for appellants, was submitted to the court.

236 *Opinion.*

Filed 5 Day of Jan'y, 1909. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

United States Circuit Court of Appeals, Fifth Circuit.

No. 1854.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL., Appellants,
versus
THE MACON GROCERY COMPANY ET AL., Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Before Pardee, McCormick, and Shelby, Circuit Judges.

MCCORMICK, *Circuit Judge*, delivered the opinion of the Court:

On July 25, 1908, the appellees, The Macon Grocery Company and other domestic corporations in the State of Georgia, and certain partnerships and individuals having their principal places of business in the Southern District of Georgia and domiciled therein, and all alleging themselves to be citizens of that State, engaged as wholesale dealers in groceries, food products and like commodities,
237 exhibited to one of the judges of the Circuit Court of the Southern District of Georgia their bill of complaint against the appellants, the Atlantic Coast Line Railroad Company, a corporation and citizen of the State of Virginia; the Louisville & Nashville Railroad Company, a corporation and citizen of the State of Kentucky; the Nashville, Chattanooga & St. Louis Railway, a corporation and citizen of the State of Tennessee; the Southern Railway Company, a corporation and citizen of the State of Virginia; and the Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation and citizen of the State of Ohio; and applied for and obtained from the judge an order whereby the appellants were required to be and appear before him at a time and place named in the order to show cause why an injunction *pendente lite* should not be granted as prayed for in the bill; and, in the meantime and until the further

order of the court, were temporarily restrained from putting into effect the advance in freight rates, referred to in the bill, to be made effective August 1, 1908, in so far as all points in the State of Georgia are concerned.

In their bill the appellees allege, in substance, that the appellants are common carriers by railroad engaged in the transportation of interstate commerce, including grain and grain products, hay and meats, from Ohio and Mississippi River crossings, Nashville, Tennessee, and related points, to points in Southeastern territory, including the State of Georgia; that each of the appellants is a member of the Southeastern Freight Association, which, appellees allege, was organized and is maintained under agreements and for purposes which constitute an illegal combination in restraint of interstate trade, and for fostering monopoly in the destruction of fair competition among carriers engaged in such trade; that the appellants, the Atlantic Coast Line Railroad Company and the Nashville, Chattanooga & St. Louis Railway, form a part of the Louisville & Nashville Railroad System, and the appellant, Cincinnati, New Orleans & Texas Pacific Railway Company, forms a part of the South-
238 ern Railway System; that these two systems have continuous lines from said crossings to southeastern destinations and are natural competitors; so that any combination, agreement or understanding between them whereby rates are advanced and maintained, is in suppression of competition; that during the year 1904 there was discontent with the railroad rates of freight from both Eastern and Western points of origin to Atlanta and related points which included Macon and other cities in Georgia, but after conferences in the latter part of that year were held certain reductions were accorded by the railway companies in the rates on Classes B, C, D, and F, flour in sacks, fresh meats, C. L., from said crossings to Atlanta and other points related, effective February 1, 1905, which rates, as reduced, were reasonable and had been since maintained; that in June, 1908, a concerted movement was begun looking to an increase in the rates on said classes and commodities from and to said points; that it was recognized that each of said two systems must unite in any such proposed increase, and, to accomplish the purpose, the intervention of the said association was sought and employed; that a declaration was filed with said association by the appellants, the Louisville & Nashville Railroad Company, the Atlantic Coast Line Railroad Company, and the Southern Railway Company, composing said systems, announcing that on August 1, 1908, they would make effective certain advances in the rates, as set out in the bill, on Classes B, C, D, and F, fresh meats, C. L., grain, grain products, hay and packing-house products, from said crossings, Nashville, Tennessee, and points with relation thereto, to Southeastern points; that the Central of Georgia Railway Company (which is not sued) also joined in such declaration, which was communicated by the Chairman of said Association to each of the lines of railroad interested, in the form of a circular; that the concurrence of action on the part of said two systems suppressed competition and forced all con-

necting carriers either to concur in the advances or give up the traffic, and such connecting carriers did concur therein, acting through the agency of said association; that subsequently the
239 Louisville & Nashville Railroad System and the Southern Railway System filed with the Interstate Commerce Commission their freight tariffs embodying said advances, and gave notice that the new tariffs would become effective on August 1, 1908; that in each of these tariffs practically every interested line joined as a participating carrier, a list of such participating lines numbering seventy-three, including each of the appellants, being shown on Page two of these tariffs. The alleged method employed by the railway companies in advancing rates through the medium of said association is set out in the bill; and it is further alleged in the bill that the territory of said Southeastern Freight Association may be roughly described as the States of South Carolina, Florida, Georgia, and that portion of Alabama east of a line drawn from Chattanooga through Birmingham, Selma and Montgomery to Pensacola; that the territory west of that line and east of the Mississippi River, embracing Mississippi and parts of Louisiana and Alabama, comes within the dominion of another like association called the Southeastern Mississippi Valley Association; that the states of Tennessee and Kentucky, including said crossings, are either embraced in the last mentioned association or in some other association bearing similar relation to the Southeastern Freight Association; that the territory north of the Ohio River and west of the Mississippi River is dominated by similar traffic associations; that the advance in rates complained of, effective August 1, 1908, was the outcome of understandings and agreements in suppression of competition and an unlawful combination in restraint of interstate trade, arrived at and made effective through the agency of the Southeastern Freight Association and other affiliated associations, and the acts of such combination in advancing rates was the result of a conspiracy which is unlawful at common law and under the statutes of the United States; that the proposed advance was upon commodities of prime utility and daily necessity, and entitled to as low a rate as may be consistent with a fair return to the carrier for the transportation service performed; that said advance would disturb existing trade relations, causing loss to appellees and injury to the consuming public; that the commodities upon which the rates were to be advanced were of such
240 necessity, and the supply from other sources was so limited, that considerable traffic would continue to move, even under the alleged exorbitant and unjust rates represented by the advance, but the effect of the increased rates would inevitably restrict the volume of the traffic, reduce the business of the appellees and other dealers, and deprive the consuming public, or some part thereof, of the ability to purchase and use said commodities to the extent to which they are entitled, to the irreparable loss and injury of the appellees and others similarly situated, and to the prejudice of the public interest; that appellees' legal remedy was inadequate for the loss and damage resulting to them from the exaction of unjust and un-

reasonably rates, and the consequent restriction of their business was a constantly recurring grievance incapable of pecuniary estimation; that should the advance be ascertained and declared to be unjust and unreasonable and reparation be allowed, not only would such remedy be inadequate to compensate for the loss and damage suffered, but the enforcement of the right of reparation or of the right to threefold damages authorized under the Sherman Anti-Trust Act, would result in a multiplicity of suits; that under the reduced rates effective February 1, 1905, traffic moved freely and the carriers prospered until the coming about of the abnormal conditions following the financial panic of October and November, 1907; that for some months thereafter the volume of railway traffic greatly declined, resulting in a loss to the carriers of both gross and net earnings; that this loss was attributable to a decrease in the volume of all traffic, but appellees believed it to be true that the decline in other traffic was much greater than in the commodities on which the proposed advance in rates applied; that not only were the carriers injuriously affected by the panic, but all lines and classes of business and industries suffered loss; that the net earnings of the appellants and other carriers in recent months had shown an advance, and there existed a reasonable expectation that net earnings of appellants and other carriers would continue to increase and normal conditions would be restored; that the carriers had no right to take advantage of an abnormal condition, which in its nature was transitory, in order to make advances in rates upon commodities of utility and necessity, when the preceding rates had been shown to be compensatory under normal conditions.

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Appellees further averred they were remediless under the strict rules of the common law, and could obtain relief only in a court of equity; and prayed for a rule against appellants to show cause why an injunction *pendente lite* should not be issued; that, in the meantime, appellants be temporarily restrained from putting into effect the proposed increase in rates to be made effective August 1, 1908, from said crossing and Nashville and related points to all points within the State of Georgia affected by said advance; and that, on a final hearing, the court enter a decree perpetuating such injunction.

At the time and place named in the rule each of the appellants entered a special appearance for the purpose of pleading to the jurisdiction of the court over the person of such appellant, and for no other purpose, and each filed its plea to the jurisdiction of the court stating, in substance, that it was not at the institution of the suit, nor then, a corporation organized or existing under the laws of the State of Georgia, or a citizen or inhabitant of that state, nor an inhabitant or resident of the Southern District of Georgia, but was, at the time of the institution of the suit, and was then, a corporation organized and existing under the laws of the state named in the plea, and a citizen of such state, and an inhabitant of a certain district therein where its corporate meetings are held and its corporate business transacted; that this suit is a civil suit wherein the jurisdiction is not founded only on the fact that the action is be-

tween citizens of different states, but is based also upon acts of Congress of the United States relating to Interstate Commerce, and alleged causes of action thereunder, and each of the appellants insisted upon its exemption from suit in that court, and claimed
242 that the Circuit Court of the United States for the district of which it was an inhabitant, if any court, had jurisdiction of such appellant, and prayed hence to be dismissed.

The appellees demurred to these pleas, and for cause of demurrer averred that the controversy presented by the bill is wholly between citizens of different states, and is solely founded upon diversity of citizenship.

The court sustained appellees' demurrers, and overruled appellants' pleas.

Thereupon the appellants, without waiving their pleas, but still relying and insisting on them, filed their joint demurrer to the bill, specifying numerous grounds not necessary to be here set out, all of which the court disregarded, and proceeded to hear the application for injunction and the affidavits and documents offered in support of it. The appellants offered no counter affidavits or evidence, but stood on their demurrers and pleas. Thereafter the judge made the following order:

"The above entitled cause came on to be heard on July 29th, 1908 on the rule issued against the defendants to show cause why an injunction *pendente lite* should not be granted.

"Defendants, and each of them, appeared specially and objected to the jurisdiction of the Court over the persons of the defendants; and the Court being of the opinion that the Court did have jurisdiction over the persons of the defendants in this cause, and so announcing, thereupon the defendants, and each of them, filed a joint and several demurrer and presented the same as cause in law why the relief prayed for should not be granted.

"Thereupon proof was submitted in behalf of complainants in support of the averments of their bill, and the cause was argued by counsel for the respective parties.

"At the conclusion of the hearing on July 30th, 1908, the Court took the matter under advisement until August 1st, 1908, when the opinion of the Court was handed down sustaining the contention of the complainants and directing an issuance of the injunction prayed for upon the condition that complainants should within ten days present their complaint to the Interstate Commerce Commission for investigation and determination of the reasonableness of the rates involved.

"And it appearing that the complainants together with other persons in the cities of Atlanta, Columbus, Rome and Athens, Georgia, have this day filed with the Interstate Commerce Commission their complaint praying the commission to investigate and determine the reasonableness of the rates involved, also to declare what are just and reasonable maximum rates.
243 "The Court being now fully advised in the premises it is thereupon considered, ordered and decreed as follows, to-wit:

"That the defendants, the Atlantic Coast Line Railroad Company;

the Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; Southern Railroad Company and Cincinnati, New Orleans & Texas Pacific Railway Company, and each of them, be and they are hereby jointly and severally enjoined from enforcing collection of the advance in rates made effective August 1st, 1908, from Ohio and Mississippi river crossings, Nashville, Tennessee, and points with relation thereto, to all points within the State of Georgia, on Classes B. C. D. and F. fresh meats C. L. grain products, hay, and packing house products; this injunction to continue and remain in force pending an investigation and determination of the reasonableness of the rates involved, by the Interstate Commerce Commission, or until further order of the Court.

"Dated and signed this August 3rd, 1908."

Thereupon this appeal was taken.

The substance of the numerous specifications of error assigned is that the court below in this suit had no jurisdiction over the persons of the appellants, and had no jurisdiction of the subject matter.

It is unnecessary to quote the familiar language of the statute now in force providing in what districts parties may be sued in the circuit court. It seems to be conceded by the appellees, at least, we think, it can not be controverted, that their right to sue in the district of their residence must rest upon the ground that the controversy presented by their bill is wholly between citizens of different states and is solely founded upon diversity of citizenship. There is no dispute as to the controversy being between citizens of different states. Whether it is solely founded upon diversity of citizenship leads to such a consideration of the subject matter of their bill and an inquiry as to the jurisdiction of the circuit court to entertain the bill at all as will answer the question as to the liability of appellants to be sued out of the district of their residence. The object of the bill was to obtain an injunction against the appellants from putting into effect an advance of rates for carriage of commodities in the conduct of interstate commerce throughout a large area, embracing parts of several different states. They charge that the appellants are common-carriers by railroad engaged in the transportation of interstate commerce, including the commodities on which advanced rates are proposed to be charged; that the appellants are members of the
244 Southeastern Freight Association, which, they allege, was organized and is maintained under agreements and for purposes which constitute an illegal combination in restraint if interstate trade, and for fostering monopoly in the destruction of fair competition among carriers engaged in such trade; that certain of the appellants form a part of the Louisville & Nashville Railroad System, and others of them, the Southern Railway System; that these two systems have continuous lines so located that they are natural competitors; that certain rates resulting from a conference between shippers and carriers and becoming effective February 1, 1905, were reasonable and had been maintained from that date; that in June, 1908, a concerted movement was begun to increase the rates on the classes and commodities named from and to eastern and western points to Atlanta and other points related; that the two systems above

named recognized that they must unite in any such proposed increase and to accomplish the purpose the intervention of the Southeastern Freight Association was employed, giving the details of proceedings between the appellants and that association which resulted in the two systems named filing with the Interstate Commerce Commission their freight tariffs, embodying the advance complained of, and giving notice that the new tariff would become effective on August 1, 1908. Without extending this second reference to the allegations of the bill, it seems clear to us that the proceedings which the appellees asked the circuit court to conduct would constitute a large share in the work of regulating interstate commerce.

In the organization of our government the Congress was given power to regulate interstate commerce. As commerce was then conducted upon public waters and public roads the free competition between carriers, with rare exceptions, adequately regulated rates for carriage. When railroads began to be constructed and articles of commerce carried thereon, their operation for many years was confined to the state in which each originated and to the carrying of intrastate commerce, subject to the regulations of their respec-
245 tive states. When, however, the intrastate lines began to be linked up into interstate lines and commercial dealings so extended that interstate commerce acquired controlling magnitude, efforts began to be made to get congress to exercise its power of regulating rates and other features of railroad carriage engaged in interstate commerce. The jealousy of the states and the opposition of the carriers prevented the passage of any general act until 1887, when the act to regulate commerce went into effect. It was the initial step in the public policy which has ever since challenged the attention of political, commercial and industrial leaders. Much contrariety of thought was evolved in the effort to apply and enforce its various provisions. The administrative tribunal, as first ordained, established and empowered, proved inadequate to the task of exercising the necessary control of the railroad carriers. The powers of this tribunal have been increased by successive amendments of the original act, and statutory rules and penalties for their infraction have been laid upon the carriers until we have the law now in force. It requires every common carrier, subject to its provisions, to file with the Interstate Commerce Commission and print and keep open to public inspection, schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, pipe line or by water, when a through route and joint rate have been established. (Sec. 6.) And provides that no change shall be made in the rates, fares and charges or joint rates, fares and charges which have been so filed and published, except after thirty days' notice to the Commission and to the public, which shall plainly state the changes proposed to be made in the schedules then in force, and the time when the changes will go into effect; provided, the commissioners may modify the requirements of this section. The several parties, when parties to a joint tariff, shall be specified therein, and each of the parties thereto other than the one filing the same, shall

file with the commission such evidence of concurrence therein
246 or acceptance thereof as may be required or approved by the commission; and where such evidence of concurrence or acceptance is filed, it shall not be necessary for the carriers filing the same to file copies of the tariff in which they are named as parties. In the case at bar seventy-three participating carriers, in the manner required, filed their concurrence and acceptance of the tariffs proposed to be made effective.

Section 8 provides that the carriers violating any of the provisions of the act shall be liable to the person or persons injured to the full amount of damages sustained in consequence of such violation, together with a reasonable counsel or attorney's fee.

Section 9 provides that persons claiming to be damaged may make their complaint either to the commission in the manner provided in the act, or by bringing suit on their own behalf for the recovery of damages for which such carrier may be liable under the provisions of the act in any District or Circuit Court of competent jurisdiction; and such persons shall not have the right to pursue both of these remedies, and must elect which of the two methods of procedure herein provided for they will adopt. This does not warrant the conclusion that it was the purpose of congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same, as to particular persons, was so unreasonable as to be unlawful, and to prevent its enforcement by injunction. (204 U. S. 441-2.)

Section 10 provides severe penalties for violations of the act by carriers.

Section 12 provides that the Commisison have authority to inquire into the business of all common carriers subject to the provisions of the act, and keep itself informed as to the manner and method in which the same is conducted, specifying elaborately the means it may use to acquire that information.

Section 13 provides how and by whom complaints may be made to the Commission, and how served upon carriers, and if the carriers shall not satisfy the complaint within a specified time, and
247 there appear to be any reasonable ground for investigation thereof, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper; and no complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Section 14 provides that when such an investigation shall be made by the Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises.

Section 15 provides that the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in Section 13 of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates or charges then demanded, charged or collected by any common carrier or carriers, subject to the provisions of this act, for

the transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of any carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed.

Section 16 provides that if, after hearing on a complaint made as provided in Section 13 of the act, the commission shall deter-
248 mine that any party complaining is entitled to an award of damages under the provisions thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. If the carrier does not comply with this order, the person for whose benefit such order was made may file in the Circuit Court of the United States in the district in which he resides, or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for the costs in the circuit court or costs at subsequent stage of proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations through such means as it shall deem needful to the facts in issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of same, the court shall enforce the obedience to such order by writ of injunction, or other process, mandatory or other-
249 wise, to restrain such carriers, its officers, agents, or representatives, from further disobedience of such order, or to enjoin

upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus. From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the cause shall have priority in hearing and determination over all other causes, except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

Section 16*a* provides that after a decision, order or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such rehearing if sufficient reason therefor be made to appear. No such application shall excuse any carrier from complying with or obeying any decision, order or requirement of the Commission, or to operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. If, upon such rehearing, it shall appear that the original decision, order or requirement, is in any respect unjust or unwarranted, the Commission may reverse, change or modify the same accordingly.

There is a provision in Section 22 of the act that, "nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute; but the provisions of this Act are in addition to such remedies."

In reference to this provision we quote at length the concluding portion of the opinion of the Supreme Court in Texas & Pacific Railway Company *v.* Abilene Cotton Oil Company, 204 U. S. our quotation beginning on Page 446, as follows:—

"This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was
250 to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.

"The proposition that if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant redress upon the basis that an established rate was unreasonable without previous action by the Commission great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency and affords no justification for so interpreting the statute as to destroy it. Even, however, if in any case we were at liberty to depart from the obvious and necessary intent of a statute upon considerations of expediency, we are admonished that the suggestions of expediency here advanced are not shown on this record to be justified. As we have seen, although the act to regulate commerce has been in force for many years, it appears that by judi-

cial exposition and in practical execution it has been interpreted and applied in accordance with the construction which we give it. That the result of such long-continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative, the provisions of the act requiring the establishment of rates and the adhesion of both carriers and shippers to the rates as established until set aside in pursuance *to* the provisions of the act. Thus, by section 1 of the act approved February 19, 1903, commonly known as the Elkins Act, which, although enacted since the shipments in question, is yet illustrative, the willful failure upon the part of any carrier to file and publish 'the tariffs or rates and charges,' as required by the act to regulate commerce and the acts amendatory thereof, 'or strictly to observe such tariffs until changed according to law,' was made a misdemeanor, and it was also made a misdemeanor to offer, grant, give, solicit, accept or receive any rebate from published rates or other concession or discrimination. And in the closing sentence of section 1 it was provided as follows:

" 'Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of this act.'

"And, by section 3, power was conferred upon the Interstate Commerce Commission to invoke the equitable powers of a circuit court of the United States to enforce an observance of the published tariffs.

"Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows, from what we have said, that the court below erred in the construction which it gave to the act to regulate commerce."

The Abilene case was begun and proceeded to final judgment in the state court, but no account of this condition was
251 taken in the judgment and opinion of the Supreme Court, and all the reasoning of the opinion against the jurisdiction of the court which rendered the judgment then under review applies, we think, at least with equal force against the jurisdiction of the Circuit Court in such cases, and with greater force against the original exercise of equitable juris-

diction by injunction or otherwise to interrupt the order of rate-making as elaborately and imperatively prescribed by the statute, or to supplement the specific and ample remedies prescribed by the act. It has been suggested that the later case of Southern Railway Co. *v.* Tift, 206 U. S. 426, indicates that the authority and reasoning in the Abilene cause is not fully applicable to the case at bar. The original bill in the Tift case was filed April 14, 1903, and a temporary restraining order was issued. On May 8 the bill was amended. The defendants appeared and filed a demurrer to the amended bill for want of jurisdiction in the court as a court of equity and as a court of the United States, but made no objection on the ground that they were not liable to suit in that district. The demurrer was overruled, but the temporary injunction was dissolved. The appellants in that case took the steps prescribed by the Interstate Commerce Act to put the advanced rates into effect, and the appellees, on June 23, 1903, filed a petition before the Interstate Commerce Commission charging that in promulgating the tariff of increased rates and maintaining and enforcing the same, the appellants were acting in concert with each other and with other lumber carrying roads, who with them were co-members of the Southeastern Freight Association. The carriers appeared before the Commission and filed a joint and several answer, in which they traversed the allegations of the petition and pleaded justification by the conditions affecting the roads and the traffic. A great deal of testimony was taken on the is-
252 sues presented, and the Commission found and concluded that the advance in rates was not warranted by the testimony, and that the increased rates put in force June 22, 1903, were unreasonable and unjust. Pending the proceedings before the Commission complainants in the original bill filed an amended bill and again moved the circuit court for an injunction. This motion for injunction was dismissed. The Commission made its order on the 7th of February, 1905, and on March 17, 1905, the complainants in the original bill presented a petition to the Circuit Court stating the substance of the findings of the Commission and attaching a copy of its report and opinion. Then another order to show cause was issued, and on June 3, 1905, the parties cited to show cause appeared and answered. Complainants filed a supplemental bill, the purpose of which was to obtain restitution of excess of rates charged over those which were alleged to be unreasonable. By stipulation between the parties the testimony taken before the Interstate Commerce Commission was filed in the Circuit Court subject only to objections to its relevancy. In addition to that testimony other evidence was submitted to the Circuit Court, and that court, after these proceedings, rendered a decree July 5 that the advance in rates, etc., was excessive, unreasonable and unjust and in violation of the act of congress known as the Act to Regulate Commerce, and the amendments thereto, and that the rates and charges resulting from said advance were likewise excessive, unreasonable and unjust and in violation of the act. The decree also directed an order of reference to the standing master of the pleadings and evidence in the cause, with instructions to ascertain the sum total of the increase in rates paid

by each of the complainants and other members of the Georgia Saw Mill Association to either or all of the defendant carriers since the rate went into effect. This decree was affirmed by this court. The original bill, it will be noticed, was filed in the Tift case be-
253 fore June 29, 1906, the date of the passage of what is popularly called the Hepburn Act. The opinion of the Supreme Court calls attention to the fact that the Circuit Court granted no relief prejudicial to the carriers on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings identical with those before the court, and upon testimony adduced upon issues made, the decision was adverse to the carriers. This action of the Commission, with its findings and conclusions, was presented to the Circuit Court, and it was upon this, in effect, that the decree of the court was rendered. There was no demurrer to that petition, and the testimony taken before the Commission was stipulated in the case, and the opinion of the trial court recites that with equal meritorious purpose counsel for the respective parties agreed that this would stand for and be the hearing for final decree in equity. It is true the opinion of the Supreme Court does use this language, in speaking of the Abilene case: "We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed, is forbidden by the Interstate Commerce Act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates." As that question was not before them, they were not required to pass upon it, and did not.

We are clear in our conviction that there is nothing in the Tift case to support the jurisdiction of the Circuit Court in entertaining the bill exhibited by the appellees in this case, and because we find nothing in the numerous decisions of the Supreme Court which we have examined to weaken the conviction we have expressed that the reasoning which is convincing and controlling against the entertaining of an action at law for damages occasioned by the enforcement of unreasonable rates which have been exacted in accordance with the schedule of rates as filed, is forbidden by the Interstate Commerce Act, for a stronger reason, a suit in equity is also
254 forbidden to prevent a filing or enforcement of a schedule of rates, or a change to unjust or unreasonable rates, it is also forbidden by the Interstate Commerce Act, because it would work an incalculably greater mischief.

We conclude that the bill in this case presents for necessary consideration the proper construction of the Act to Regulate Commerce, and, therefore, the jurisdiction of the court does not rest solely upon the diversity of the citizenship of the parties. We conclude that the sound construction of the different provisions of the Act to Regulate Commerce as amended and now in force necessarily forbid the exercise of the jurisdiction attempted to be invoked by the bill in this case.

It follows that the decree appealed from must be reversed, and the

cause remanded to the Circuit Court with instruction to dismiss the bill without prejudice.

255 Filed 5 Day of Jan'y, 1909. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

In the United States Circuit Court of Appeals, Fifth Circuit.

Number 1854.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL., Appellants,
v.
THE MACON GROCERY COMPANY ET AL., Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

PARDEE, *Circuit Judge,* concurring:

I fully concur in the opinion prepared by Judge McCormick and the conclusion reached thereunder, because—

1st. I doubt if the lower court had jurisdiction *ratione personæ;*

2d. The complainants have other full and adequate remedies through the Interstate Commerce Commission;

3d. The effect of an injunction in this case would be to throw the interstate rates of the whole south-eastern territory into disorder and confusion, resulting in greater evils than those suggested and alleged in the present bill;

4th. The initial regulation of interstate rates is placed by law in the hands of the Interstate Commerce Commission, and
256 the courts should not interfere to restrain, compel or regulate, except when invoked after final action by the Commission and in accordance with the rules prescribed in the laws regulating interstate commerce.

It is not necessary to amplify these views further than is done in Judge McCormick's lucid statement of the case.

257 Filed 5 Day of Jan'y, 1909. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

In the United States Circuit Court of Appeals, Fifth Circuit.

Number 1854.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL., Appellants,
vs.
THE MACON GROCERY COMPANY ET AL., Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

SHELBY, *Circuit Judge,* dissenting:

As I understand the opinion just read, it is held that the circuit court has no jurisdiction of the case made by the bill for the reason

that it is deprived of jurisdiction by a "sound construction of the different provisions of the act to regulate commerce." Section 22 of the act provides that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." The words "common law" are here used in contradistinction to "statute law." When so used, they include those doctrines of equity jurisprudence which have not been expressed in legislative enactments. The phrase "remedies now existing at common law or by statute" includes all existing remedies. Remedies existing by statute may be either legal or equitable, and remedies existing at common law—that is, remedies that have not been expressed by legislative enactment—may be either legal or
258 equitable. 2 Words & Phrases Judicially Defined, 1329, and authorities there cited. A bill in equity to enjoin a wrong causing irreparable injury is a remedy at common law, in the sense that it existed in England, independent of statute, before the organization of this government, and exists in this country independent of statute. It is true that altho this remedy by bill is expressly reserved by this act, it would not continue to exist if its exercise "would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 226, 246. The equitable remedy asserted in this case is not necessarily in conflict with the act. The just purposes of the act are promoted, not crippled, by leaving intact the equitable remedies preventive of irreparable injury and a multiplicity of suits. This case does not, in my opinion, come within the rule or principle of the Abilene case. The Supreme Court has said that it is not, by the authority of that case, required to say "that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed, is forbidden by the Interstate Commerce Act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates." Southern Ry. Co. *v.* Tift, 206 U. S. 428, 437. The act does not, I think, deprive the circuit court of jurisdiction when facts are alleged showing that the equitable remedy is necessary to prevent irreparable injury and a multiplicity of suits.

The clause of the act reserving remedies should not be disregarded except as to remedies that would defeat the operation and enforcement of the act—remedies that are absolutely inconsistent with the act. The remedy sought in this case, and the procedure thus far, as the record shows, are in harmony with the purposes of the
259 act. The cases that have been decided since the decision of the Abilene case show that the rule there announced does not abrogate the clause quoted from section 22 of the act, nor destroy the preventive jurisdiction of courts of equity; and that such jurisdiction may be exercised without in any way invading the domain of the Interstate Commerce Commission. Southern Railway Co. *v.* Tift, 206 U. S. 428; Northern Pacific Railway Co. *et al. v.* Pacific Coast Lumber Manufacturers' Assn. *et al.*, —— Fed. ——; —— C.

C. A. ——; M. C. Kiser Co. *v.* Central of Georgia Ry. Co., 158 Fed. 193; Jewett Bros. & Jewett *v.* Chicago M. & St. P. Ry. Co., 156 Fed. 160.

I cannot concur in the decree dismissing the bill for want of jurisdiction of the subject matter of the suit.

260 *Decree.*

November Term, 1908.

JAN. 5, 1909.

(Extract from Minutes.)

No. 1854.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL.
vs.
THE MACON GROCERY COMPANY ET AL.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Georgia, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, and this cause remanded to said Circuit Court with instructions to dismiss the bill without prejudice.

It is further ordered, adjudged and decreed that the appellees, The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merritts & Company, F. W. Hazlehurst Company, Adams & Johnston, Solomon & McRae, R. T. Birdsey & Company, George A. McArthur, Peoples Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry; Orr, Smith Grocery Company, Brandon & Dryer, and Gallaher Grocery Company, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

261 *Petition for Appeal.*

In the United States Circuit Court of Appeals for the Fifth Circuit, October Term, 1908.

No. 1854.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITS & COMPANY, F. W. HAZLEHURST COMPANY, ADAMS & JOHNSTON, SOLOMON & McRAE, R. T. BIRDSEY & COMPANY, GEORGE A. McARTHUR, PEOPLE'S GROCERY COMPANY, PARKER, WILLIS COMPANY, CORDELE GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S. PENDLETON COMPANY, DALTON GROCERY COMPANY, MARION CURRY, ORR, SMITH GROCERY COMPANY, BRANDON & DRYER, and GALLAGHER GROCERY COMPANY, Appellants,

vs.

THE ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, and CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Appellees.

To the Honorable the Judges of said Court:

Your petitioners, The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merrits & Company, F. W. Hazlehurst Company, Adams & Johnston, Solomon & McRae, R. T. Birdsey & Company, George A. McArthur, People's Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry, Orr, Smith Grocery Company, Brandon & Dryer and Gallaher, Grocery Company, appellants in the above entitled cause, conceiving themselves aggrieved by the final decree of this Court rendered on the 5th
262 day of January, 1909, in favor of appellees in the above entitled cause, do hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignments of error, which is filed herewith.

Wherefore your petitioners pray for an order that said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM A. WIMBISH,
EDGAR WATKINS,
Solicitors and of Counsel for Petitioners.

The foregoing has the following indorsements to-wit:

No. 1854. Atlantic Coast Line Railroad Co. *et al. vs.* The Macon Grocery Co. *et al.* Petition for Appeal. U. S. Circuit Court of Appeals. Filed Jan. 27, 1909. Charles H. Lednum, Clerk.

263 *Order Granting Appeal.*

In the United States Circuit Court of Appeals for the Fifth Circuit, October Term, 1908.

No. 1854.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITS & COMPANY, F. W. HAZLEHURST COMPANY, ADAMS & JOHNSTON, SOLOMON & McRAE, R. T. BIRDSEY & COMPANY, GEORGE A. McARTHUR, PEOPLE'S GROCERY COMPANY, PARKER, WILLIS COMPANY, CORDELE GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S. PENDLETON COMPANY, DALTON GROCERY COMPANY, MARION CURRY, ORR, SMITH GROCERY COMPANY, BRANDON & DRYER, and GALLAHER GROCERY COMPANY, Appellants,

vs.

THE ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, and CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Appellees.

The above appellants having prayed an appeal from the decree rendered by this Court in the above entitled cause on the 5th day of January, 1909, to the Supreme Court of the United States, and said appellants having filed with the Clerk of this Court their petition for appeal, together with the assignments of errors, and an appeal bond, which bond has been duly approved by the Court:

It is ordered, adjudged and decreed by the Court that such appeal be granted and allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

The foregoing is hereby approved for entry this 22nd day
264 of January, 1909.

DON A. PARDEE,
Circuit Judge.

The foregoing has the following indorsements to-wit:

No. 1854. Atlantic Coast Line Railroad Co. *et al. vs.* The Macon Grocery Co. *et al.* Order granting appeal. U. S. Circuit Court of Appeals. Filed Jan. 27, 1909. Charles H. Lednum, Clerk.

265 *Assignments of Error.*

In the United States Circuit Court of Appeals for the Fifth Circuit, October Term, 1908.

No. 1854.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITS & COMPANY, F. W. HAZLEHURST COMPANY, ADAMS & JOHNSTON, SOLOMON & McRAE, R. T. BIRDSEY & COMPANY, GEORGE A. McARTHUR, PEOPLE'S GROCERY COMPANY, PARKER, WILLIS COMPANY, CORDELE GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S. PENDLETON COMPANY, DALTON GROCERY COMPANY, MARION CURRY, ORR-SMITH GROCERY COMPANY, BRANDON & DRYER, and GALLAHER GROCERY COMPANY, Appellants,

vs.

THE ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, and CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Appellees.

And now on this the 22nd day of January, in the year of our Lord One Thousand Nine Hundred and Nine, come the appellants in the above entitled cause, viz: The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merrits & Company, F. W. Hazlehurst Company, Adams & Johnston, Solomon & McRae, R. T. Birdsey & Company, George A. McArthur, Peoples Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry, Orr, Smith Grocery Company, Brandon & Dryer and Gallaher Grocery Company, by W. A. Wimbish and Edgar Watkins, their
266 solicitors, and say that in the decree rendered by the United States Circuit Court of Appeals for the Fifth Circuit, in the above entitled cause, on the 5th day of January, 1909, and in the record and proceedings in said cause in said Court, there is manifest error as set forth in these their petition for appeal.

I.

That the said Circuit Court of Appeals erred in reversing the decree rendered in the above entitled cause on August 3rd, 1908, by the Circuit Court of the United States for the Southern District of Georgia, wherein and whereby the said Circuit Court assumed jurisdiction over the persons and subject matter of the cause, and granted an injunction against the advance in rates complained of, pending an investigation and determination of the reasonableness of such rates by the Interstate Commerce Commission.

II.

That said Circuit Court of Appeals erred in not affirming said decree rendered in said cause on August 3rd, 1908, by said Circuit Court of the United States for the Southern District of Georgia.

III.

That said Circuit Court erred in remanding said above entitled cause to the said Circuit Court with instructions to dismiss the original bill filed therein, without prejudice.

IV.

That said Circuit Court of Appeals erred in remanding the said cause with instructions to dismiss the bill, for that it appeared on the record that the Circuit Court of the United States for the Southern District of Georgia had jurisdiction both over the subject matter and over the persons of the parties to the cause.

V.

That the said Circuit Court of Appeals erred in adjudging and decreeing that the jurisdiction of said Circuit Court did not rest only upon the fact of diversity of citizenship of the parties.

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VI.

That the said Circuit Court erred in failing to adjudge and decree that if the jurisdiction did not rest only upon the fact of the diversity of citizenship, it was founded upon the federal question arising out of the Act to Regulate Commerce and its amendments; and that such jurisdiction being exclusive in the federal courts the defendants (appellees) were subject to be sued in the district where found.

VII.

That the said Circuit Court of Appeals erred in adjudging and decreeing that the Interstate Commerce Commission was vested with exclusive jurisdiction over the subject matter of the suit and the cause of action therein set forth and presented.

VIII.

That the said Circuit Court of Appeals erred in adjudging and decreeing that Section 22 of the Act to Regulate Commerce, as amended, did not permit the filing and prosecution of a suit in equity to enjoin an unjust and unreasonable advance in freight rates occasioning irreparable injury and involving a multiplicity of suits.

IX.

That the said Circuit Court of Appeals erred in failing to adjudge and decree that Section 22 of the Act to Regulate Commerce, as amended, expressly preserves the remedy by suit in equity to enjoin

an unreasonable advance in rates such as would occasion irreparable injury, in accordance with the practice and jurisdiction of courts of equity existing at common law at the time of the adoption of the Act to Regulate Commerce.

X.

That the said Circuit Court of Appeals erred in failing to adjudge and decree that the said Circuit Court had jurisdiction to enjoin the advance complained of, on the ground that said advance was the result of an unlawful conspiracy and combination in restraint of trade and commerce, occasioning special damage, irreparable in its nature, to the appellants.

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XI.

That the said Circuit Court of Appeals erred in adjudging and decreeing that because an action at law in a state court for damages occasioned by the enforcement of unreasonable rates, which had been exacted in accordance with the schedule of rates as filed, is forbidden by the Interstate Commerce Act, for a stronger reason a suit in equity to prevent the filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates, is also forbidden by said Act.

XII.

That the said Circuit Court of Appeals erred in adjudging and decreeing that a sound construction of the different provisions of the Act to Regulate Commerce as amended and now in force, necessarily forbids the exercise of a court of equity of its jurisdiction to enjoin an unreasonable advance in rates or a change to unjust or unreasonable rates.

XIII.

That the said Circuit Court of Appeals erred in adjudging and in effect decreeing that appellants have full and adequate remedies for the wrong and injury complained of through the Interstate Commerce Commission; and that the Courts are without jurisdiction to grant equitable relief in such cases in advance of action by the Interstate Commerce Commission.

XIV.

That the said Circuit Court of Appeals erred in adjudging and in effect decreeing that the initial regulation of interstate rates is placed by law in the hands of the Interstate Commerce Commission, and the courts should not interfere to restrain, compel or regulate, except when invoked, after final action by the Commission, and in accordance with the rules prescribed by the laws regulating interstate commerce.

XV.

That the said Circuit Court of Appeals erred in failing to adjudge and decree that the special remedies provided by the Act to
269 Regulate Commerce and its amendments are not exclusive of equitable remedies, for that the special remedies do not afford adequate relief for the injury resulting from an unreasonable advance in rates, or a change to unjust or unreasonable rates.

XVI.

That the said Circuit Court of Appeals erred in failing to adjudge and decree that shippers have a property right to transportation by common carriers at just and reasonable rates; and that to deny to shippers the equitable remedy, jurisdiction to grant which is inherent in courts of equity for the protection of such right, in effect deprives the shippers of their property without just compensation and without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

XVII.

That the Circuit Court of Appeals erred in failing to adjudge and decree that the judicial power of the United States, being by the Constitution vested in one Supreme Court and such inferior courts as Congress may from time to time establish, the Circuit Courts of the United States cannot be deprived of the exercise of this judicial power inherent in courts the United States established by Congress in accordance with the Constitutional requirements.

XVIII.

That the said Circuit Court of Appeals erred in reversing the decree of the Circuit Court and remanding the cause with instructions to dismiss the bill, for that the citizen, having a property right to transportation at reasonable rates, is entitled to invoke the jurisdiction and process of a court of equity for the preservation and protection of that right, in accordance with the judicial methods established by the wisdom of successive ages; and that to deny the citizen the right to invoke the exercise of the inherent jurisdiction of a court of equity, without conferring upon him the right to invoke such judicial relief in some other forum of competent jurisdiction, denies to him the right to have his controversy deter-
270 mined in accordance with the requirements of due process of law, guaranteed to him by the Fifth Amendment to the Constitution of the United States.

Wherefore the above named appellants in the above entitled cause, viz. The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merrits & Company, F. W. Hazlehurst Company, Adams & Johnston, Solomon & McRae, R. T. Birdsey & Company, George A. McArthur, People's Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry, Orr, Smith Grocery Company, Brandon & Dryer, and Gallaher Grocery Company, pray that the said decree of said United States Circuit Court of Appeals for the Fifth Circuit, rendered in the above entitled cause on the 5th day of January, 1909, be reversed; and that this Honorable Court will enter on the record such order and decree as may be meet and proper in the premises.

WILLIAM A. WIMBISH,
EDGAR WATKINS,
Solicitors and of Counsel for the Above-named Appellants.

The foregoing has the following indorsement to-wit:

No. 1854. Atlantic Coast Line Railroad Co. *et al.*, *vs.* The Macon Grocery Co. *et al.* Assignments of Error. U. S. Circuit Court of Appeals. Filed Jan. 27, 1909. Charles H. Lednum, Clerk.

271 *Appeal Bond.*

In the United States Circuit Court of Appeals for the Fifth Circuit, October Term, 1908.

No. 1854.

THE MACON GROCERY COMPANY, A. B. SMALL COMPANY, ADAMS BROTHERS COMPANY, MERRITS & COMPANY, F. W. HAZLEHURST COMPANY, ADAMS & JOHNSTON, SOLOMON & MCRAE, R. T. BIRDSEY & COMPANY, GEORGE A. MCARTHUR, PEOPLE'S GROCERY COMPANY, PARKER, WILLIS COMPANY, CORDELE GROCERY COMPANY, ALBANY GROCERY COMPANY, TIFT & PEED GROCERY COMPANY, A. S. PENDLETON COMPANY, DALTON GROCERY COMPANY, MARION CURRY, ORR, SMITH GROCERY COMPANY, BRANDON & DRYER, and GALLAHER GROCERY COMPANY, Appellants,

vs.

THE ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY and CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Appellees.

Know all men by these presents, That we, The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merrits & Company, F. W. Hazlehurst Company, Adams & Johnston, Solomon & McRae, R. T. Birdsey & Company, George A. McArthur, People's Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry, Orr, Smith Grocery Company, Brandon & Dryer and Gallaher Grocery Company, as principals, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the said Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway Company, Southern Railway Company and Cincinnati,
272 New Orleans & Texas Pacific Railway Company, in the sum of Twenty-Five hundred Dollars, to be paid to the said Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway Company, Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company, for the payment of which well and truly to be made, we hereby bind ourselves, our successors, heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals this 22nd day of January in the year of our Lord one thousand nine hundred and nine.

Whereas the above named The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merrits & Company, F. W. Hazlehurst Company, Adams & Johnston, Solomon & McRae, R.

T. Birdsey & Company, George A. McArthur, People's Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry, Orr, Smith Grocery Company, Brandon & Dryer and Gallaher Grocery Company, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree renderd in the above entitled cause by the United States Circuit Court of Appeals for the Fifth Circuit, on the 5th day of January, 1909:

Now therefore the condition of this obligation is such that if the above named The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merrits & Company, F. W. Hazlehurst Company, Adams & Johnston, Solomon & McRae, R. T. Birdsey & Company, George A. McArthur, People's Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry, Orr, Smith Grocery Company, Brandon & Dryer and Gallaher Grocery Company shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their said appeal, then this obligation shall be void, otherwise the same shall remain of full force and virtue.

273 In witness whereof the above named appellants as principals, and Fidelity Deposit Company of Maryland as surety, have hereunto set their hands and seals this the 22nd day of January, 1909, the said principals acting herein by W. A. Wimbish, their duly authorized solicitor and attorney.

MACON GROCERY COMPANY, [SEAL.]
A. B. SMALL COMPANY, [SEAL.]
ADAMS BROS. COMPANY, [SEAL.]
MERRITS & COMPANY, [SEAL.]
F. W. HAZLEHURST COMPANY, [SEAL.]
ADAMS & JOHNSTON, [SEAL.]
SOLOMON & McRAE, [SEAL.]
R. T. BIRDSEY & COMPANY, [SEAL.]
GEORGE A. McARTHUR, [SEAL.]
PEOPLE'S GROCERY COMPANY, [SEAL.]
PARKER-WILLIS COMPANY, [SEAL.]
CORDELE GROCERY COMPANY, [SEAL.]
ALBANY GROCERY COMPANY, [SEAL.]
TIFT & PEED GROCERY COMPANY, [SEAL.]
A. S. PENDLETON COMPANY, [SEAL.]
DALTON GROCERY COMPANY, [SEAL.]
MARION CURRY, [SEAL.]
ORR-SMITH GROCERY COMPANY, [SEAL.]
BRANDON & DRYER, [SEAL.]
GALLAHER GROCERY COMPANY, [SEAL.]
By W. A. WIMBISH,
Their Solicitor and Attorney, as Principals.
FIDELITY & DEPOSIT CO. OF MARYLAND,
AARON HANS, *As Surety in Fact.* [SEAL.]

Attest:
G. ARTHUR HOWELL.

Bond approved and accepted. This 22nd day of January, 1909.

DON A. PARDEE,
Circuit Judge.

274 The foregoing has the following indorsements to-wit:
No. 1854. Atlantic Coast Line Railroad Co. *et al. vs.* The Macon Grocery Co. *et al.* Appeal Bond. U. S. Circuit Court of Appeals, Filed Jan. 27, 1909. Charles H. Lednum, Clerk.

275 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

To the Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway Company, Southern Railway Company, and Cincinnati, New Orleans & Texas Pacific Railway Company:

You are hereby cited and admonished to be and appear at the Court room of the United States Supreme Court at Washington, D. C., on the 22d day of February, 1909, pursuant to an appeal allowed and granted by the United States Circuit Court of Appeals for the Fifth Circuit, in the cause of The Macon Grocery Company, A. B. Small Company, Adams Brothers Company, Merrits & Company, F. W. Hazlehurst Company, Adams & Johnston, Solomon & McRae, R. T. Birdsey & Company, George A. McArthur, People's Grocery Company, Parker, Willis Company, Cordele Grocery Company, Albany Grocery Company, Tift & Peed Grocery Company, A. S. Pendleton Company, Dalton Grocery Company, Marion Curry, Orr, Smith Grocery Company, Brandon & Dryer and Galleher Grocery Company, as appellants, and Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway Company, Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company, as appellees, to show cause, if any there be, why the decree of the United States Circuit Court of Appeals for the Fifth Circuit, rendered on the 5th day of January, 1909, should not be corrected and speedy
276 justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 22d day of January, 1909.

DON A. PARDEE,
Circuit Judge.

We hereby accept service of the above citation. This 22 day of January, 1909.

ATLANTIC COAST LINE RAILROAD CO.,
W. E. KAY,
By McDANIEL, ALSTON & BLACK, *Its Solicitors.*
SOUTHERN RY. CO.,
By C. B. NORTHROP,
McDANIEL, ALSTON & BLACK, *Its Solicitors.*
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO.,
By C. B. NORTHROP,
SANDERS McDANIEL, *Its Solicitors.*
NASHVILLE, CHATTANOOGA & ST. LOUIS RY.,
By CLAUD WALLER,
TYE, PEEPLES, BRYAN & JORDAN,
Its Solicitors.
LOUISVILLE & NASHVILLE R. R. CO.,
By H. L. STONE,
TYE, PEEPLES, BRYAN & JORDAN,
Its Solicitors.

[Endorsed:] No. 1854. Atlantic Coast Line Railroad Co. *et al vs.* The Macon Grocery Co. *et al.* Citation. U. S. Circuit Court of Appeals. Filed Jan. 27, 1909. Charles H. Lednum, Clerk.

277 United States Circuit Court of Appeals.

I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages contain a true copy of the record, assignment of errors, and all proceedings had, including the opinion of the court, in the case of Atlantic Coast Line Railroad Company *et al*, appellants, *vs.* The Macon Grocery Company *et al*, appellees, No. 1854, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 29th day of January, A. D. 1909.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No. 21,506. U. S. circuit court of appeals, 5th circuit. Term No. 710. The Macon Grocery Company, A. B. Small Company, Adams Brothers' Company *et al.*, appellants, *vs.* Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company *et al.* Filed February 3d, 1909. File No. 21,506

IN THE

Supreme Court of the United States.

OCTOBER TERM 1908, No. 710.

MACON GROCERY COMPANY, *et al.*, *Appellants*,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, *et al.*, *Appellees.*

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Motion to Advance.

Macon Grocery Company and others, appellants in the above-entitled cause, appearing by their counsel of record, William A. Wimbish and Edgar Watkins, present this their motion to advance the hearing of said cause in conformity with the rules and practice of this court, and thereupon respectfully represent as follows, to wit:

I.

The question of great public importance presented in this case concerns the jurisdiction of a federal court of equity to enjoin the establishment of an unjust and unreasonable schedule of interstate freight rates, or a change to unjust and unreasonable rates.

The Circuit Court in this case, finding that the advance in rates complained of was arbitrary, unjust and unreasonable, and would occasion irreparable injury to shippers and to the public, enjoined the enforcement of a proposed advance in rates, pending a consideration by the Interstate Commerce Commission of what are just and reasonable maximum rates in the premises, upon complaint directed by the Court to be filed with the Commission.

The precise question arising on the record in this case is whether the Act to Regulate Commerce, and its amendments, deprives a federal court of equity of the jurisdiction to enjoin the enforcement of an unjust and unreasonable advance in rates proposed, but not established.

An early determination of this question is of vital importance to shippers, to carriers and to the public, as well as to the Interstate Commerce Commission in the performance of the public duties conferred upon it by the Act to Regulate Commerce and its amendments.

The question has been presented to and decided by only two appellate courts, so far as movants are advised, and the decisions of these two courts are in conflict. The United States Circuit Court of Appeals for the Ninth

Circuit, on October 5, 1908, sustained the jurisdiction of the Circuit Court in granting an injunction against the enforcement of an unreasonable advance in rates, pending a consideration of the matter by the Interstate Commerce Commission—*Northern Pacific Railway Company, et al.* v. *Pacific Coast Lumber Manufacturers Association et al*, 165 Fed. 1 (advance sheets January 21, 1909). The identical question was presented to the United States Circuit Court of Appeals for the Fifth Circuit in the instant case. That Court held that the Circuit Court was without jurisdiction to grant such injunctions.

II.

The question arises in this case upon the following state of facts:

The appellees and other common carriers, on June 27, 1908, filed with the Interstate Commerce Commission a schedule of rates, and gave notice that the rates would be made effective August 1, 1908. The rates proposed to be made effective represented an advance of two cents per hundred pounds in the rates on Classes "C," "D" and "F," including grain, grain products, flour and hay, from Ohio and Mississippi River crossings, Nashville, Tennessee, and points related thereto, to southeastern destinations.

The original bill in this case was filed on July 25, 1908, in the Circuit Court of the United States for the Southern District of Georgia by the appellants (complainants), who are wholesale grocery merchants and dealers in grain, grain products, flour and hay, residing and doing business in the Southern District of Georgia.

The bill averred that the defendant carriers operated continuous lines of railway from said river crossings into the State of Georgia, and could and did fix and maintain the rates of freight to be paid on the commodities affected to the destination specified. It was averred that the advance in rates was unjust, unreasonable and excessive, and that it was the direct outcome of a combination and conspiracy between said carriers in suppression of competition and in restraint of interstate trade. The bill further averred that the advance, if enforced, would occasion irreparable injury to the complainants (appellants) and others similarly situated, and that the legal remedy was inadequate.

Upon presentation of the bill, the Court issued a temporary restraining order and set the case down for interlocutory hearing on July 29, 1908. At this hearing the defendants (appellees) appeared specially and pleaded to the jurisdiction of the Court over the persons of the defendants. These pleas being overruled by the Court, the defendants (appellees) presented their joint and several demurrers as cause in law why the injunction should not be granted. These demurrers challenged the jurisdiction of the Court over the subject and subject matter of the suit, upon the ground that the Act to Regulate Commerce and its amendments conferred exclusive jurisdiction over interstate rates and charges upon the Interstate Commerce Commission, and deprived a court of equity of the jurisdiction to enjoin the establishment of a proposed schedule of rates or a change to unjust and unreasonable rates.

The Circuit Court held and decided that the power given to the Interstate Commerce Commission to determine the reasonableness of rates and to establish maximum rates, by the Interstate Commerce Act and its amendments, does not deprive a federal court of equity of jurisdiction to enjoin the putting into effect of an interstate rate which is shown or admitted to be arbitrary, unreasonable or unjust, until such rate can be passed upon by the Interstate Commerce Commission.

The Court declared that the temporary restraining order theretofore granted would be continued in effect until the further order of the Court, upon condition that the complainants (appellants) should, within ten days thereafter, make application to the Interstate Commerce Commission to fix maximum just and reasonable rates to be thereafter charged to the destinations named on the commodities affected. The opinion of the Court is reported in 163 Fed., 738.

In accordance with this opinion, complaint was duly presented to the Interstate Commerce Commission on August 3, 1908, and on the same day the Court entered an interlocutory decree continuing in effect the restraining order pending a consideration and determination of the matter by the Interstate Commerce Commission. Evidence has been taken by the Commission upon the complaint filed with it, but the cause has not yet been assigned for argument.

From this order of the Court an appeal was taken by the defendants (appellees) to the United States Circuit Court of Appeals for the Fifth Circuit; and a *supersedeas*

and suspension of the injunction order was obtained upon giving bond in the sum of one hundred thousand dollars to repay to the complainants and all other shippers the excess in rates that might be collected over what should finally be determined to be just and reasonable rates, in the event the then appellants should fail to prosecute their appeal to effect.

On January 5, 1909, the Circuit Court of Appeals entered an order remanding the case to the Circuit Court, with directions to dismiss the bill without prejudice.

The opinion of the Court was rendered by Circuit Judge McCormick, Circuit Judge Pardee concurring and Circuit Judge Shelby dissenting. The majority of the Judges were of opinion that the question presented concerning the jurisdiction of the Circuit Court over the controversy was controlled by the opinion of this Court in the case of *Texas & Pacific Railway Company v. Abilene Cotton Oil Company*, 204 U. S., 426; and upon authority of that case it was held that the Act to Regulate Commerce and its amendments deprived the Circuit Court of jurisdiction to enjoin the enforcement of an unjust and unreasonable advance in a schedule of rates, in advance of any action thereon by the Interstate Commerce Commission. Circuit Judge Shelby dissented upon the ground that Section 22 of the Act to Regulate Commerce preserved in courts of equity the then existing jurisdiction to enjoin a proposed unjust advance in freight rates which would occasion irreparable injury.

An appeal has been duly prosecuted to this Court from the order and decree of the Circuit Court of Ap-

peals. and a *supersedeas* has been obtained by the filing of a bond in the statutory form.

III.

Movants further show that the Circuit Courts of the United States generally have, upon authority of the case of the *Southern Railway Company, et al, v. Tift, et al*, 208 U. S., 428, sustained the jurisdiction of the Court to grant injunctions in such cases, pending an investigation of the matter by the Interstate Commerce Commission.

Movants respectfully submit that it is of vital importance to shippers, to carriers and to the public, that the jurisdiction of the Court in this regard should be defined. In the present state of the decisions, injunctions of this character would in proper cases be granted by the Circuit Courts in the Ninth Circuit; while in the Fifth Circuit, the Circuit Courts would doubtless feel constrained to follow the authority of the Circuit Court of Appeals in this case and deny such injunctions. In cases where injunctions should be granted, the jurisdiction of the court would be doubtful, and carriers observing the orders of the courts might be exposed to the penalties prescribed by law for charging and collecting rates other than those named in their tariffs filed with the Interstate Commerce Commission. The uncertainty concerning this question hampers and embarrasses the Interstate Commerce Commission in the exercise of the powers and duties conferred upon it; and an early determination of the question will greatly facilitate the administrative work of the Commission.

IV.

Notice has been given to opposing counsel that a motion to advance the hearing of this case would be presented to this Court on Tuesday, February 23, 1909.

The Interstate Commerce Commission joins in the representation concerning the public importance of this question, in so far as it may be proper for the Commission to do so.

Wherefore, movants pray the Court to advance the hearing of this cause, and that it may be assigned for such early day as may be convenient to the Court.

Respectfully submitted,

WILLIAM A. WIMBISH,

EDGAR WATKINS,

Of Counsel for Movants (Appellants.)

The Interstate Commerce Commission, if it is proper to do so, wishes to join in the representation that this case is of great public importance, and also to state that an early decision would be helpful to the Commission in the discharge of its administrative duties.

P. J. FARRELL,

Solicitor for the Interstate Commerce Commission.

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Missouri. The suggestion that the acts complained of were committed in Missouri is not relevant to the question of jurisdiction but bears rather upon the liability of the Kansas Company for acts claimed to have been committed by the Missouri Company? In this connection the observations of Judge Caldwell in Fitzgerald vs. Missouri Pacific Railway Company, 45 Fed. 812 are pertinent. While it is true that some stress was laid upon the fact that the cause of action in Missouri Pacific Railway Co. vs. Mech (69 Fed., 753) arose in Kansas, I do not understand that it was a determinative feature in the consideration of the case.

Second.—The contention of the defendant that a Federal question does not appear from the averments of the bill of complaint is not well taken. The cause of action and ground for relief stated in the bill clearly arise under the laws of the United States. At least sufficient is stated to challenge the consideration by the court upon such ground of the matters and things set forth in the bill.

Third.—The most serious contention is that raised by the demurrer, and it is whether or not a bill in equity will lie under the Interstate Commerce act to redress the grievances set forth in the bill of complaint without first submitting them to the Interstate Commerce Commission.

It is contended by the defendant that the complaint should have been first submitted to the Commission and that a Federal court will not entertain a suit in equity in the first instance where the principal object sought is a correction of alleged discriminative rates. On behalf of the complainant it is contended, in order to sustain the jurisdiction of the court on the ground that a Federal question is involved, that the suit arises under the Inter-

state Commerce act, and in order to avoid the force of defendant's demurrer it is contended that the suit is maintainable in equity under general principles of law irrespective of the provisions of the Interstate Commerce act. That the contentions of complainants' counsel may be somewhat inconsistent is immaterial so far as concerns the question of jurisdiction for the reason that as already indicated jurisdiction is sustainable upon the ground of diverse citizenship.

It is apparent, however, from the face of the bill, that the complainants are seeking to enforce the provisions of the Interstate Commerce act. As complainants' counsel says in his brief "The Interstate Commerce act is made the basis of a charge in the bill against discrimination." Sec. 8 of the original act (24 Stat. 379) provides that any common carrier subject to the provisions of the act shall be liable to the person injured by a violation thereof for the full amount of damages sustained. Sec. 9 provides that any person damaged may either make complaint to the Interstate Commerce Commission as provided for in the act or may bring suit for the recovery of damages in any district or circuit court of the United States of competent jurisdiction, but that he shall not have the right to pursue both of said remedies, and must in any case elect which one of the two methods of procedure he will adopt. Sec. 10 denounces a violation of the act of any one subject to the provisions thereof as a misdemeanor and provides that the district courts of the United States shall have jurisdiction of such offense. Sec. 10 creates the Interstate Commerce Commission and other sections define the powers and duties of the Commission. Sec. 14 provides that in every investigation made by the Commission a report in writing shall be made which shall include the findings of fact upon which the conclusions of the Commission are based, with its recommendations in respect

thereof, and that "such findings so made shall thereafter in all judicial proceedings be deemed *prima facie* evidence as to each and every fact found."

Sec. 16 provides that whenever any common carrier subject to the provisions of the act shall violate or refuse or neglect to obey any lawful order or requirement of the Commission it shall be the duty of the Commission and also lawful for any company or person interested in the order or requirement, to apply in a summary way by petition to the Circuit Court of the United States sitting in equity in the proper judicial district. Power is given to the Circuit Court to thereupon hear and determine the matter as a court of equity and to do justice in the premises. Upon such hearing the report of the Commission is to be taken as *prima facie* evidence of the matters therein stated. The court has power in such proceeding to issue writs of injunction or other process enforcing obedience to lawful orders of the Commission. An appeal is provided from the decree of the Circuit Court direct to the Supreme Court of the United States, but by subsequent legislation the appeal is now to the Circuit Courts of Appeals in the first instance.

Sec. 10 of the amendatory act of 1889 (25 Stat. 863) provides that the Circuit and District Courts of the United States shall have jurisdiction to issue writs of *mandamus* on the relation of any person to enforce the right of the relator to have interstate traffic moved by the common carrier at the same rates as are charged or upon terms or conditions as favorable as those given by the carrier to other shippers for like traffic under similar conditions. It is also provided that the writ of *mandamus* shall be cumulative and it will not be held to exclude or interfere with other remedies provided by the Interstate Commerce Act.

Sec. 22 of the original act provides that nothing therein contained shall in any way abridge or alter the remedies

existing at common law or by statute, but the provisions of the act are in addition to such remedies.

I am unable to discover that the Supreme Court of the United States has passed upon the question which is raised by the demurrer in this case. It has been the uniform practice for persons or corporations complaining of the violation by common carriers of the provisions of the Interstate Commerce act to first apply to the Commission for an order redressing the grievances complained of. After such orders have been made it has generally happened that the Commission itself instituted the proceedings in the Circuit Court for the enforcement thereof, although in some instances proceedings were instituted by the parties claiming to be injured and more directly in interest. In both classes of cases, however, the orders of the Commission were set forth and relied upon as *prima facie* evidence.

Now the complainants contend in the case in hand that they may ignore the Commission altogether and may bring a suit in equity in the Circuit Court and obtain full relief against discriminative rates, and require the court to make an exhaustive and comprehensive inquiry into the whole subject of rates, the effect of competition of lines of transportation between Kansas City and St. Louis, similar and dissimilar conditions, and, in fact, do everything which the Interstate Commerce Commission was expressly created to do in the first instance as an aid and assistance to Courts in subsequent litigation. Some of the decisions of the Supreme Court of the United States throw light upon this question and indicate how the Commission is to be regarded in its relation to the courts in matters in litigation similar to those involved in this suit. It should be first observed that when complaint is made to the Commission and it has investigated and made its report, and thereafter suit is instituted in the Circuit Court, that court is not confined to

the testimony elicited before the Commission but may try the matters in issue *de novo*. It is therefore inferable that if the Circuit Court has jurisdiction of a suit in equity such as the one in hand without regard to the Interstate Commerce Commission or the preferment of a complaint before it, the Circuit Court in a suit brought after the Commission has acted should, the bill of complaint being broad enough, proceed to final decree, although its conclusions might differ in substantial particulars from the findings of the Commission. In other words if the contention of complainant's counsel is correct, the findings of the Commissioners being merely *prima facie* evidence, the Circuit Court having secured jurisdiction of the particular cause and possessing, as complainants' counsel contends plenary jurisdiction as a court of equity under general principles of law irrespective of the provisions of the Interstate Commerce Act should proceed to the ultimate determination of the rights of the parties without remanding or re-referring the case to the Interstate Commerce Commission. This, however, is not done.

Railway Company vs. Commission, 162 U. S., 196.

In this case the Supreme Court in expressing disapproval of the method of railroad companies in withholding the larger part of their evidence from the Commission and first presenting it in the Circuit Court, said:—

> "The Commission is an administrative board, and the courts are only to be resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court or when the orders of the Commission have been disregarded."

In this case the Circuit Court of Appeals examined the evidence adduced before the Commission and the evidence

adduced before the Circuit Court and proceeded to an original investigation of the testimony and determined the facts established thereby. The Supreme Court said that the Circuit Court of Appeals should have reversed the decree of the Circuit Court, set aside the order, and remanded the cause to the Commission, in order that it might, if it saw fit, proceed therein according to law. It was also said that "the defendant was entitled to have its defense considered in the first instance at least by the Commission upon a full consideration of all the circumstances and conditions upon which a legitimate order can be founded * * * and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake of its own motion to find and pass upon such questions of fact in a case in the position in which the present one was."

L. & N. Railroad Co. vs. Behlmer, 175 U. S., 648:

In this case Behlmer, who was a wholesale dealer in hay and grain, began proceedings before the Interstate Commerce Commission complaining of discriminative rates. Testimony having been taken and a hearing had, the Commission made an order requiring the Railroad Company to desist from making certain charges. The order not having been obeyed, Behlmer filed his complaint in the Circuit Court of the United States for the Eastern District of South Carolina. By stipulation the testimony taken before the Commission was used at the hearing in the Circuit Court and in addition thereto certain documentary evidence was received. The Circuit Court entered a decree that Behlmer's bill be dismissed. From this decree an appeal was taken to the Circuit Court of Appeals for the fourth circuit and that court reversed the decree of the Circuit Court and remanded the cause with instructions to render a decree substantially in accordance with the order made by the Commission. The cause was then taken to the Su-

preme Court of the United States. The Supreme Court reversed the decree of the Circuit Court of Appeals and ordered that the case be remanded to the Circuit Court with instructions to modify its decree by providing that the dismissal be without prejudice to the right of the Commission to proceed, upon the evidence already introduced before it or upon such evidence and any additional evidence which it might allow to be introduced, to hear and determine the matter in conformity to law. In other words, the cause was not remanded to the Circuit Court with instructions to hear and determine the cause as a court of equity having plenary jurisdiction of the matters in controversy.

The same rule was adhered to in Interstate Commerce Commission vs. Steamship Company, 181 U. S., 29. In this case the Supreme Court declined to enter into an original investigation of the evidence adduced but held that it was the duty of the court to correct the error of law committed by the commission, and having done so it modified the decree of the Circuit Court of Appeals and of the Circuit Court by providing that the dismissal of the bills should be without prejudice to the right of the Commission to make an additional investigation of the questions contained in the record pertinent to the complaints presented to that body.

Railway Company vs. Commission, 181 U. S., 1:

In this case the decree of the Circuit Court of Appeals of the sixth circuit was reversed and the case was remanded to the Circuit Court with instructions to set aside its decree adjudging that the order of the Commission be enforced and to dismiss the application of the Commission without prejudice to its right to proceed, upon the evidence already introduced or upon such further pleadings and evidence as it might allow to be made or introduced, to hear and determine the matter in controversy according to law. The Supreme Court declined to go into the whole evidence in order to determine the questions presented, nor

did it in remanding the cause authorize the Circuit Court to do so. The Supreme Court said that the Commission "from the nature of its organization and the duties imposed upon it by statute is peculiarly competent to pass upon questions of fact of the character here arising."

Southern Pacific Co. vs. Colorado Fuel & Iron Co., 101 Fed., 783:

The opinion of the Circuit Court of Appeals was delivevered by Judge Thayer. The injunction of the lower court based upon the action of the Interstate Commerce Commission contained three clauses. The first and third clauses were held to be beyond the power of the Commission and of the Circuit Court for the reason that an attempt was made to prescribe a schedule of maximum rates, the Supreme Court of the United States having determined that the Interstate Commerce Commission had no such power. By the second clause of the order of the Circuit Court the defendants were restrained in general terms from demanding unreasonable rates and from giving undue and unreasonable preferences to persons or localities or from subjecting the complainant to an unreasonable disadvantage, etc. Judge Thayer said that this clause might possibly be upheld but that it was not apparent that any special advantage would result to the complainant from an order couched in such general terms but which merely repeats the general admonitions of the Interstate Commerce Act. It is noteworthy that instead of so remanding the cause that the indefinite character of the second clause might be corrected by the Circuit Court the case was remanded with directions to dismiss the bill of complaint. Judge Thayer also said *that no reason was perceived why the remedy at law for the threatened wrong should be pronounced ineffectual or inadequate.*

He said:

> "The damages that the complainant will sustain if it is right in its contention as to the unreasonableness of the proposed rates can be ascertained by a court and jury, while it is not suggested that the defendant Company is insolvent, or that it will be unable to respond for such damages as a jury may assess. Besides, a single verdict before a jury establishing the unreasonableness or discriminating character of the proposed rate would probably lead to a withdrawal of the rate, and avoid the necessity for further actions."

Doubtless there are cases which fall within the provisions of the Interstate Commerce act but of which the jurisdiction of the Circuit Courts as courts of equity is not referable alone to the terms of the act, but arises independently of the act from general principles of equity jurisprudence.

In my opinion the case at bar as illustrated by the averments of the bill and the nature and scope of the remedy is not of that class.

The bill will therefore be dismissed without prejudice to actions at law or proceedings before the Interstate Commerce Commission as complainants may elect.

WILLIAM C. HOOK,
Judge.

January 7, 1902.

Endorsed: 7809 Vanderslice-Lynds vs. Mo. Pacific Ry. Co. Memorandum Opinion. Filed January 7, 1902, Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA,
District of Kansas. } ss.

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas,

do hereby certify the foregoing to be a true, full and correct copy of Memorandum Opinion in the suit of Vanderslice-Lynds Mercantile Company, *et al., vs.* Misouri Pacific Railway Company, Case No. 7809, in said court.

(SEAL)

The seal of the Circuit Court of the United States District of Kansas.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 7th day of May A. D. 1909.

GEO. F. SHARITT,
Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

C. W. ROBINSON LUMBER COMPANY, ET AL.,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

The C. W. Robinson Lumber Company, *et al.*, ask a perpetual injunction whereby the R. R. Companies and each of them shall be enjoined from continuing in effect an increase of *two cents* per hundred of the previously existing freight rate for yellow pine lumber from points within the State of Mississippi, to points without the State, and especially to the Ohio River points and beyond, and west of Buffalo and Pittsburg, and the prayer of the bill on printed page 12 is "That" the court will decree that a writ of injunction do issue enjoining the defendants, and each of them, from continuing in effect and operation the said increase of freight rates on yellow pine lumber from points within the State of Mississippi to points without the State, and especially to points within the territory above mentioned and also from at other times or in other ways increasing the previously existing rates from and to such points without previous application to this court for a modification, that the court will decree that the existing rates between the points designated are unjust, unreasonable and illegal in so far as they discriminate against Mississippi points in favor of points in Arkansas and Louisiana west of the Mississippi River or yellow pine lumber, and also in so far as

they discriminate in favor of the other woods in the same territory and impose upon the shipper of lumber the burden of equipping cars at the expense of the shipper, and that the Southeast Mississippi Valley Association be declared an illegal combination in restraint of interstate trade, and that the defendant R. R. Companies be enjoined from prosecuting the purposes of such illegal combinations through the medium of said association in so far as concerns the transportation of lumber to and from points directly affecting the rights and interests of complainants, etc.

To the complainants bill the defendants interpose the following demurrer:

1st. Because it appears by the allegations of said "Bill" of complaint that it does not present a controversy between citizens of states, but presents a controversy between citizens of Georgia, as plaintiffs, and citizens of other states as joint defendants, and said bill does not set up any controversy between said plaintiffs and said defendants arising under the constitution and laws of the United States.

2d. Because the facts stated in said bill of complaint show no case of which the United States Circuit Court for the Southern District of Miss. has jurisdiction in equity.

3d. Because it appears from the allegations in said bill, that the said plaintiffs have not made or stated such cause as entitles them to relief sought and prayed for against these defendants in a Court of Equity of the United States.

4th. Because it does not appear from the allegations in said bill of complaint that the same is brought or filed under any statute of the United States and the same does not set forth facts showing that the complainants or either of them, are entitled to maintain any bill of complaint against these defendants, or either of them, under any statute of the United States.

5th. Because it appears from said complainants' bill of complaint, and upon the face of said bill, that the said

complainants have each an adequate and complete remedy at law for the said several alleged wrongs in said bil of complaint set up against these defendants.

6th. Because it appears by the allegations of said bill of complaint that the same is brought to restrain an alleged contract, combination, or conspiracy in restraint of trade and commerce among the several states, and to monopolize a part of the trade or commerce among said several states, in contravention of the statutes of the United States, and that under said statutes of the United States neither said plaintiffs nor any individual have any right to relief in equity, but are restricted to the remedy at law provided by said statute.

7th. Because the allegations of said bill of complaint do not show that the said plaintiffs, or either of them, are entitled to maintain any action under the statutes of the United States entitled "An act to regulate commerce," and acts amendatory thereof.

8th. Because the granting of the injunction sought in this case would in effect fix the rate to be charged by the defendant in the future for the transportation of lumber from Mississippi points to points on the Ohio river and beyond, at the rates now prevailing as the maximum rates; that the right to fix such rates is a legislative power, not a judicial one, and a decree so fixing said rates is beyond the power and jurisdiction of the court.

9th. Because the bill of complaint shows that the Southeastern Mississippi Valley Association, one of the defendants, is composed of others than the defendant R. R. Companies who are not made parties to this bill.

10th. Because the bill is multifarious in that it seeks to have the Southeastern Miss. Valley Association declared to be an illegal combination in restraint of interstate trade, and also to have the rates complained of adjudged to be unreasonable and defendants enjoined from continuing them in

effect, and also to enjoin defendants from imposing upon the complainants the burden of equipping cars at their expense, as set out in the bill, etc., etc.

Elaborate and able arguments have been presented in this case and the "importance of the question cannot be overestimated." It is alleged in complainant's bill that there is invested in the production and manufacture of yellow pine lumber approximately fifty million dollars, that the annual output is estimated at one thousand million feet of the value at the mills of ten million dollars. "Billions of dollars are also invested in railroad properties, millions of passengers as well as millions of tons of freight are moved each year by the different railroad companies, and this transportation is carried on by a multitude of corporations, working in different parts of the country, and subject to varying and diverse conditions." It is immaterial whether this bill be considered as one filed under the statute, or whether as one filed under the general equity jurisdiction of the court. The real question here presented is, *can this court fix the freight rate to be charged by the railroad companies in the future for the transportation of lumber from Mississippi points to points on the Ohio river and beyond at the rates now prevailing as the maximum rates?* I think a decree so fixing such rates is beyond the power and jurisdiction of this court. That the right to fix such rates is a legislative power and not a judicial one. In Interstate Commerce Commission vs. Railway Co., 167 U. S., at page 505, the Supreme Court of the United States says that: "The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function. Judge Thayer in delivering the opinion of the court in "Southern Pacific Co. vs. Colorado Fuel and Iron Co., 101 F. R., 783, uses the following language: "In the cases already cited the reasoning of the court by which it reached the conclu-

sion that the Interstate Commerce Commission has nc power to fix maximum or minimum rates, either directly or indirectly, is founded upon the fundamental proposition that the fixing of rates for interstate carriers involves an exercise of *legislative*, as distinguished from judicial, power, and that the power does not belong to the commission because it was not granted by the interstate commerce act.

For much stronger reasons the power to fix a schedule of rates does not belong to the Federal Court, because Congress has not attempted to delegate that authority to the courts, even if it could divest itself of that legislative function, and impose upon the judicial branch of the government.

Quite a number of authorities were read of cases involving the "long and short haul clause" and questions of discrimination between towns, and individuals and actual handling as between two or more parties of interstate freights, these questions were under paragraph *one*, *two* and *three* of the interstate commerce law and the discrimination consisted in a (swift?) departure from the published rate. It is not necessary for me to refer to all of the statutes brought into view by this litigation, nor is it necessary to follow learned counsel into the discussion of the internal expansion and development of the United States, and the striking features of the history of the 19th century, whether on this continent or in the world, and whether the development of this great country was brought about by the expansion of the carrying agencies of this country or the wonderful powers of the "Central Yellow Pine Associations." The real question here presented is whether a Federal court, working through its powers of equity and by its right of injunction can, in effect, fix and perpetuate a schedule of freight rates? I do not think that this court has jurisdiction to grant the relief sought and that the demurrer interposed

for the purpose of this hearing is sustained and that the temporary injunction is hereby dissolved and the bill dismissed.

H. C. NILES, *Judge.*

This opinion was filed May 29, 1903,—L. B. Moseley, Clerk.

I, L. B. Moseley, clerk of the Circuit Court of the United States, do hereby certify the foregoing opinion of court to be a true and correct copy of the opinion delivered in the case of C. W. Robinson Lumber Co., *et al.*, vs. Illinois Central R. R. Co., *et al.*, as the same appears of record in my office at Jackson, Mississippi.

Witness my hand and seal of said court hereunto affixed, this the 30th day of September, 1909.

L. B. MOSELEY,

[SEAL.] *Clerk.*

IN THE COURT OF COMMON PLEAS NO. TWO, OF ALLEGHENY COUNTY, PA.

A. F. BACON,
vs.
PENNSYLVANIA COMPANY. } No. 1193, April Term, 1908.

FRAZER, P. J., August 13, 1908.

The purpose of this bill was to enjoin defendant from collecting fares in excess of two cents per mile from passengers traveling on its railway between points in the State of Pennsylvania and points in other States. The case comes before us on bill and answer, from which the facts appear substantially as follows:

FINDINGS OF FACT.

1. Defendant is a corporation duly created, operating a railroad betwen the city of Pittsburgh in the State of Pennsylvania and the city of Chicago in the State of Illinois. Its railroad extends through the western part of the State of Pennsylvania, through the States of Ohio and Indiana, and terminates at the city of Chicago in the State of Illinois.

2. Plaintiff is a citizen of the city of McKeesport in the State of Pennsylvania. His business is that of a produce broker, and his place of business is in the city of Pittsburgh.

3. On February 1, 1908, plaintiff purchased at the Union Station, Pittsburgh, a ticket entitling him to transportation over the lines of defendant company from Pittsburgh to the town of New Waterford in the State of Ohio, paying therefor the sum of $1.35 and upon that ticket was carried by defendant as a passenger upon one of its regular passenger trains to his destination. Returning to Pittsburgh the same day plaintiff entered a car of defendant company at New Waterford and was carried as a passenger to Enon, Pa., a

distance of 9.1 miles upon payment to the conducter in charge of the train, of the sum of twenty-five cents, and upon payment to the conductor of the further sum of ninety cents was carried from Enon to Pittsburgh as a passenger on the train of the defendant.

4. On February 14, 1908, plaintiff again visited the town of New Waterford, Ohio, traveling as a passenger upon a train of defendant, on a ticket purchased from its agent at the Union Station, Pittsburgh, for which he paid the sum of $1.35, and in returning therefrom paid to the conductor of the train for his transportation as follows: From New Waterford to East Palestine, Ohio, four miles, ten cents; from East Palestine, Ohio, to Enon, Pa., five miles, eighteen cents; and from Enon, Pa., to Pittsburgh, forty-five miles, ninety-two cents, aggregating the sum of $1.20.

5. The distances and fares charged first-class passengers for travel between the points named, are as follows:

	Miles.	
Pittsburgh, Pa., to New Waterford, O.....	54.3	$1.35
New Waterford, O., to Enon, Pa.....	9.1	.25
Enon, Pa., to Pittsburgh, Pa.....	45.2	.92
Enon, Pa., to Allegheny (Pittsburgh), Pa...	44.2	.90
New Waterford, O., to East Palestine, O.....	4.4	.10
East Palestine, O., to Enon, Pa.....	4.7	.15

The fares indicated above are in accordance with the interstate tariff of passenger rates duly filed with the Interstate Commerce Commission of the United States, and also published and posted in accordance with the Acts of Congress.

6. Defendant requires its conductors to collect from interstate passengers who fail or neglect to purchase tickets at regular stations, a sum in excess of regular rates, the ticket-fare and train-fare between New Waterford and East Palestine, Ohio, and Enon, Pa., being as follows:

	Ticket.	Train Fare.
New Waterford, O., to Enon, Pa.....	.25	.30
East Palestine, O., to Enon, Pa.....	.15	.20

The above indicated excess rates charged by conductors upon trains are not unreasonable and are in accordance with the tariff of train-fares duly published and filed with the Interstate Commerce Commission, in accordance with the Acts of Congress.

7. Plaintiff's contention is that the rates shown in the 5th and 6th findings of fact are unreasonable, and his prayers for relief are twenty-six in number, and as we understand them are all substantially included in the one designated "X," which prays for an injunction because of the alleged unreasonableness of the rates fixed, restraining defendant from collecting from its passengers for transportation between points in Pennsylvania and points in other states a greater sum than two cents per mile; and he further asks that defendant be required to withdraw from the Interstate Commerce Commission all schedules of passenger rates over its lines of railroad and system in which the rates fixed are in excess of two cents per mile, and further "that the defendant Company and its representatives as aforesaid shall be commanded and required to establish and maintain at the state lines between said several states of Pennsylvania, Ohio, Indiana and Illinois, stations or stopping-places for passengers and intending passengers whereat tickets at said lawful rate may be purchased and baggage checked and rechecked by said passengers, and to provide similar facilities for such purchase of tickets at said lawful rate and such checking and rechecking of baggage upon all trains which said defendant Company shall deem not needful to make such stops at said stopping-places or stations at said state lines which may be provided as aforesaid."

CONCLUSIONS OF LAW.

1. The first question for consideration is whether or not we have jurisdiction to determine the questions raised. The Constitution of the United States confers upon Congress power to regulate commerce among several states, and for the purpose of carrying into effect that provision a number of laws have been enacted by Congress. These statutes are full and comprehensive and, *inter alia,* provide for the appointment of a Commission whose duty it is to pass upon all rates fixed by common carriers engaged in interstate commerce, and also hear all complaints made either by passengers, shippers or carriers, and that no injustice may be done it is provided that every common carrier shall file with the Commission a schedule showing all its rates, fares and charges for transportation not only between points within the state of its domicile but also between points within that state and points within other states. These schedules are required to be plainly printed and notices for use of the public must be kept posted in conspicuous places in every depot, station, and office of the carrier where passengers or freight are received. These rates when approved by the Commission become the legal chargeable tariffs, and cannot be changed except after thirty days notice to the Commission, and to the public. Carriers are prohibited from engaging or participating in the transportation of interstate freight or passengers unless the rates and fares upon which the same are transported have been filed and published in accordance with the provisions of the statute, and when this has been done carriers are not permitted to charge or demand, collect or receive a greater or less or different compensation between points named in such schedules, than the rates specified and in effect at the time. If the rate is unreasonable, the party injured may complain to the Interstate Commerce Commission, and if, after hearing, the Com-

mission shall determine the complaint to be well founded and that complainant is entitled to damages for a violation of the Act upon the part of the carrier, it shall make an order directing the carrier to pay the amount which it shall find due on or before a day named. Should the carrier fail to comply with the order within the time limited, complainant may file in the Circuit Court for the district in which he resides, or in which is located the principal operating office of the carrier, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises, and thereupon proceedings shall be had in the manner provided by the Act.

Complaints for the recovery of damages must be filed with the Commission within two years from the time the action accrues and no later, and petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order. This brief reference to the Acts of Congress clearly indicates an intention upon the part of the Federal Government to take complete jurisdiction over the commerce between the states, and to confer original jurisdiction upon the Interstate Commerce Commission to make all necessary rules and regulations for the purpose of carrying out the provisions of the statutes. An examination of the Acts of Congress relating to interstate commerce and the decision of the courts relating thereto, convinces us that the Interstate Commerce Commission has original jurisdiction in all controversies arising out of interstate traffic; that the Commission is possessed with power to prevent a threatened injury and remedy any wrong, and that it is the duty of all interstate passengers or shippers to first apply to that Commission to redress a wrong before applying to the Courts. In this conclusion we are supported by the case of Gulf, Colorado & Santa Fe Railroad Company vs. Hefley, 158 U. S. Reports, 98. In that case a rate had been fixed in a bill of

lading for an interstate shipment, which was less than that established under the provisions of the interstate commerce laws. When the goods arrived at destination the carrier refused to deliver them to the consignee upon payment of the rate provided in the bill of lading and demanded and collected the established schedule, or higher, rate. For collecting the higher rate, the corporation was proceeded against under the laws of the State of Texas, which imposed a penalty upon the carrier for charging more than the rate fixed in the bill of lading. The state court entered judgment against the carrier for the penalty. This action was reversed by the United States Supreme Court, that Court holding that the shipper was bound by the schedule published by the Interstate Commerce Commission, notwithstanding the state law to the contrary, and that the state law must yield to the Federal.

In the case of the Texas & Pacific Railroad Company vs. Abilene Cotton Oil Company, 204 U. S., 426, the shipper brought suit in a state court and recovered damages alleged to have been sustained by reason of a violation by the common carrier of the interstate commerce law. The action of the state court entering judgment in favor of the shipper was reversed, the Court saying:

> "Concluding, as we do, that a shipper seeking reparation predicated on the unreasonableness of the established rate must, under the act to regulate commerce, primarily, invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows from what we have said, that

> the court below erred in the construction it gave to the act to regulate commerce."

Other cases might be cited to the same effect. It seems clear to us that plaintiff's remedy is primarily with the Interstate Commerce Commission, and that we are at this time without jurisdiction. The bill must therefore be dismissed.

Let a decree be drawn accordingly.

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

AT HUNTINGTON.

(Rendered May 27, 1909.)

No. 156.

COLUMBUS IRON & STEEL COMPANY *vs.* KANAWHA & MICHIGAN RY. COMPANY. } IN EQUITY.

ON MOTION FOR TEMPORARY INJUNCTION AND DEMURRER TO THE BILL.

Z. T. Vinson and E. W. Knight for Pltff. Jas. H. Hoyt, C. T. Lewis and J. H. Holt (Holt & Duncan) for Defts.

STATEMENT OF THE CASE.

On April 10, 1909, complainant tendered to a Judge of the United States Circuit Court for the Southern District of West Virginia its bill against Kanawha & Michigan Railway Company, seeking an injunction to restrain the defendant company from filing with the Interstate Commerce Commission a certain proposed schedule of joint rates on coal shipments between points on the line of defendant company in West Virginia and points on the Great Lakes, and from proceeding in any wise to put such proposed rates into effect.

Upon the allegation contained in the original bill that the defendant proposed to file these rates with the Commission on April 12, 1909, and that there was no time to give notice to the defendant of the application for a preliminary re-

straining order, and that if the rates were permitted to be filed they would necessarily go into effect and be charged to the plaintiff, resulting in immediate and irreparable injury to it, the Judge reluctantly granted a temporary restraining order, setting the motion for a preliminary injunction down for hearing on the 23d day of April, 1909, that being the earliest date on which the court (owing to prior engagements) would have an open date on which to hear the matter.

On April 23, 1909, both parties to the bill appeared by their respective attorneys, and thereupon the plaintiff tendered and asked leave to file an amended bill, which leave was granted over the formal objection of defendant. The defendant thereupon tendered its written demurrer to the original bill, which by agreement of counsel in open court is to be treated as a demurrer to both the original and amended bills as filed, which demurrer was ordered to be filed, and the matters of law arising thereon were argued and submitted, and the temporary restraining order therefor granted was continued in force pending the decision upon the demurrer.

The matter is now before me upon the motion for a temporary injunction and upon the said demurrer. The points specially relied on in the demurrer are in effect the following:

1. That it appears by the bill that the matter in dispute arises under the act of Congress regulating Interstate Commerce and that it does not appear from the bill that the Court has jurisdiction of the subject matter for the reason that it does not appear therefrom that the question of the reasonableness or fairness of the proposed rates has been passed upon by the Interstate Commerce Commission, in whom, it is alleged, is vested the sole power to determine questions of that character relating to Interstate Commerce; and that it does not appear that complainant or any other

person or corporation interested therein has filed any complaint with said Commission respecting said proposed rates.

2. That the allegations of the bill do not make a case for equitable relief.

In order to see just what the case made by the bill is I will endeavor, as briefly as may be, to present its essential features: The complainant, reciting by way of preamble that it is a corporation organized under the laws of Ohio and a citizen of said State, brings this bill of complaint

> "for itself and for and on behalf of all persons or corporations engaged in mining and shipping coal to points on the Great Lakes over and by the line of the Kanawha and Michigan Railway Company who would be affected by the proposed increase of rates in this bill complained of, against the Kanawha and Michigan Railway Company,"

a corporation organized under the laws of West Virginia and being a citizen of that State and a resident and inhabitant of the Southern Judicial District thereof; that the plaintiff has two mines on the line of defendant's road in Fayette County, W. Va., and has invested about $275,000 in its business and has contract for the coming year for 100,000 tons of coal for what is known as the "lake trade"; that the entire product of its mines is shipped over the defendant's railway; that the defendant is a common carrier engaged in interstate commerce; that there are a great many other mines besides plaintiff's situate along defendant's line of road in Kanawha and Fayette counties, W. Va., which ship coal over defendant's line to lake ports; that all of these mines are in what is known as the "Kanawha District," and that all would be affected alike by the proposed increased rates from said district to lake ports; that since 1904 the defendant and its connecting lines have had in

force a joint rate on coal of 97 cents per ton from all points in the Kanawha District to Toledo, Ohio, and that said rate is now in effect; that for the years 1901 to 1903 the rate from said District to Toledo was $1.02 per ton, and that while said rate now in existence is not highly remunerative, it is a just and reasonable rate

> "because with an increase of said rates it would not be possible for the mines on said Kanawha and Michigan Railway to continue shipping into that market," etc.;

that in selling coal in the lake trade plaintiff not only competes with other producers on the line of defendant railway, but with other West Virginia coal fields, to-wit: Thacker, Pocahontas and Kenova districts on the Norfolk & Western Railway, Fairmont District on the B. & O. Ry., Kanawha and New River on the C. & O. Ry., and also with coals from the Eastern Ohio District and coals from the Pittsburg District in Pennsylvania; that these competitors in the Ohio and Pittsburg Districts although now enjoying lower rates than those in force in the Kanawha District on defendant's line, have demanded of the railway companies on whose lines they are situated, to-wit: The Pennsylvania lines, the Wheeling & Lake Erie Railway Company and the Baltimore and Ohio Railway Company; that the existing differentials be largely increased either by a reduction of the rates to them or by an increase on the rates from the Kanawha District on defendant's line; that in obedience to these demands pressure has been brought to bear on defendant by the Pennsylvania Lines and by the Wheeling and Lake Erie Railway Company to compel it to increase its rates by threats to bring on a general rate war and thus, though knowing that the existing rate is just and reasonable, defendant has been forced to yield and has announced that, effective May 15, the rates on Lake coal to Toledo from Kanawha Dis-

trict will be $1.06¼ cents per ton; that if these rates are allowed to be filed and go into effect plaintiff will be unable to fill its contract without loss to itself; that plaintiff is without remedy at law because if the rates go into effect they cannot be corrected by the Interstate Commerce Commission in time to enable plaintiff to gain any business in the lake trade this year and that this will result in loss of business in future years, etc.; that existing rates give a present differential in favor of Ohio and Pennsylvania coal operators of nine cents per ton and that the proposed increase of freight rate will increase this differential to eighteen and one-quarter cents, which will *practically* bar West Virginia coal from the Kanawha District from the lake market. As a make-weight, probably, the bill avers that these proposed rates will be filed as the result of a combination, conspiracy and agreement in restraint of interstate trade. It is also averred that the matter "in controversy in this suit in the case of your orators alone is more than two thousand dollars exclusive of interest and costs."

KELLER, District Judge.

The important inquiries suggested by the motion for a temporary injunction and by the demurrer to the bill are first, has the court jurisdiction of the subject matter of the bill, and if so, second, does the bill make a case for the relief prayed for.

Manifestly, if the first inquiry be answered in the negative there is no occasion to proceed with a consideration of the second. I will therefore first address myself to the broad and important question whether the Circuit Courts of the United States possess jurisdiction to grant relief of the character prayed for in this bill, and as a preliminary it is necessary to inquire just what that relief is, and under what grant of jurisdictional power the aid of the Circuit Court is asked; for it is axiomatic that the *inferior* fed-

eral courts are courts of limited jurisdiction possessing only those powers which have been conferred on them by Congress under the permissive power granted by the Constitution for their establishment. The Supreme Court of the United States in an early case involving the question of jurisdiction by the inferior federal courts said:

> "No court of the United States except the Supreme Court, possesses any jurisdiction not given by the legislative power."
> U. S. vs. Hudson, 7 Cranch., 32 (3 L. Ed., 259).

> "No right to sue in the Federal courts exists except such as one expressly provided for by Federal Statute or the Constitution."
> Bank of U. S. vs. Deveaux, 5 Cranch., 61 (3 L. Ed., 38).

And in the late case of Kentucky vs. Powers found in 201 U. S., 387 (50 L. Ed., 633), the same doctrine is expressed in these words:

> "The subordinate judicial tribunals of the United States can exercise only such jurisdiction, civil and criminal, as may be authorized by act of Congress."

I take it for granted that there is no contention here that this court can derive any jurisdictional power by reason of the allegations of the bill to the effect that the threatened wrong complained of originated as the result of an illegal combination and conspiracy in restraint of trade, because the definite threatened injury is the filing of interstate joint rates under the provisions of the Interstate Commerce Act as amended, and I gather that the allegations to which I have referred were introduced as foundations for evidence tending or intended to show that the rates so proposed to be filed were unreasonable as not proceeding

from the necessities of the carrier for an increased rate, but imposed upon it against its will and by reason of the *vis major* of such combination. For the purpose of this inquiry we need not consider whether such evidence would or would not be admissible upon the question of the reasonableness and *bona fides* of the rates proposed to be filed, because the question here is purely that of jurisdiction, and no relief is sought by the bill under the provisions of what is known as the Sherman Act, nor could it be granted under the provisions of that act, were it directly so sought.

Minn. vs. Northern Securities Co., 194, U. S., 48;
Southern Indiana Express Co. vs. U. S. Express Co., 88 Fed., 659, 92 Fed., 1022;
Gulf, etc., R. R. Co. vs. Miami Steamship Co., 86 Fed., 407;
Pidcock vs. Harrington, 64 Fed., 821;
U. S. vs. Atchison, T. & S. F. R. Co., 142 Fed., 176.

We are remitted then, for the ground of the jurisdiction invoked by the bill to one of two sources. Either it must have been granted by Congress under the general statutes conferring jurisdiction, or by the Interstate Commerce Act itself.

The subjects of civil jurisdiction embraced in the jurisdictional act of March 3, 1875, were substantially the same as they are under the amendments of 1887 and 1888, but the act provided for a jurisdictional value of $500 instead of $2,000 as now required.

Prior to the passage of the Interstate Commerce Act no jurisdiction in respect to that subject could have existed by virtue of any special act, because Congress had not exercised its right to regulate that subject.

It is also true that a suit, having for its precise object the restraining of a carrier from filing a schedule of rates

with the Interstate Commerce Commission could not have been brought under the general laws in any court prior to the passage of the Interstate Commerce Act, because there was no such body as the Interstate Commerce Commission and there was neither opportunity for nor obligation upon a railroad company to file its rates anywhere.

Prior, then, to the passage of the aforesaid Act the theory of jurisdiction in a case seeking to prevent the enforcement of alleged unreasonable rates for transporting goods between any two points whether within the limits of the same State or in two different States, was that of the inherent right of a court of equity to prevent the enforcement of excessive and unreasonable rates as against a suitor seeking its protection. The jurisdiction at that time did not arise under the constitution or any law of the United States and could not have existed in any inferior Federal Court save as it arose by reason of a diversity of citizenship existing between the parties, and in which case such court could, concurrently with the State courts, exercise the jurisdiction in equity exercised by the State courts to prevent a common law injury for which there was no appropriate legal remedy or to enforce the common law legal remedy for the violation of a common law right.

But such suits in equity prior to the passage of the Interstate Commerce Act was purely personal between the parties to the suit, and in no way affected the rights of third parties, or those of the defendant transportation company in respect to third parties. For example, if defendant was enforcing a rate from Cincinnati to Chicago that "A," a shipper, claimed to be unreasonable, and he brought a suit in equity to enjoin the enforcement of such rate against him, nothing *in that proceeding* at all interfered with the right of the defendant to enforce the rate against "B" and all other shippers similarly situated, and, hence, the damage to the defendant was limited to the charges it had been

enjoined from enforcing against "A" and the means of recouping such damage might and probably would have been provided for by bond.

On the other hand if the chancellor concluded that the injunction should not be granted or should be dissolved, his action in that regard did not preclude "B" or any other shipper from applying in any court of competent jurisdiction for like relief on his part to that prayed for by "A."

This was true because transportation by common carriers all stood upon the same footing, and no attempt had been made by Congress to regulate by statutory enactment the one branch thereof in respect to which Sec. 8, Article 1, of the Constitution of the United States had provided that:

> "The Congress shall have power * * * to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."

This power is manifestly a very extensive and important one as relates to commerce among the several States at the present time, but at the time of the adoption of the Constitution the instruments of such commerce were so meagre that it was not considered important or necessary to enforce the power by legislation, and when it became apparent that the good of the public required such legislation the transportation interests had become so powerful that efforts in that direction were successfully opposed until the Act of February 4, 1887, known as the Interstate Commerce Act, was passed. During all this time the only checks upon the instruments of commerce whether internal or interstate were those imposed by the courts under their general powers to protect against wrong, and these checks the courts imposed, not in any attempt to *regulate interstate commerce*, but under their general powers to prevent wrong or to give damages for a wrong suffered, and their judg-

ments and decrees were always limited to the matters *and to the parties* before them on the pleadings.

That this limited jurisdiction existed is held by the Supreme Court of the United States, in which Mr. Justice White says in his opinion in Texas and P. R. Co. vs. Abilene Cotton Oil Co., 204 U. S., page 436 (5 L. Ed., page 557):

> "It may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that, when a carrier accepted goods, without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted, either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent Com., 599, and note A; 2 Smith Lead. Cas., pt. 1, 8th Ed. (Hare & W. notes), page 457."

It becomes important to determine what effect the passage of the Interstate Commerce Law with its amendments has necessarily had upon this admitted jurisdiction, so far as that jurisdiction existed in relation to interstate rates.

To properly examine that question I know of no better way to consider the intent and effect of that legislation than by glancing at "the old law, the mischief and the remedy." As to the "old law," there was none except the common law doctrine already adverted to, the administration of which was necessarily confined within the narrow limits of redressing private injuries, or preventing them, upon a proper showing, by the injunctive powers of the court.

The mischief of this condition was very apparent. Possibly the greatest evil to the public arose from the fact that no requirement existed for the publicity and uniformity of rates, thus enabling the carrier to discriminate between shippers with comparatively little danger of detection and consequent suit by the injured party. Another mischief was that no power existed to compel fair dealing toward the entire public, or to punish for a failure to so deal.

In Texas & P. R. Co. vs. Abilene Cotton Oil Co., *supra*, Mr. Justice White in discussing the causes that led to the passage of this Act, and the mischiefs remedied by it, says (page 439):

> "When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. Parsons vs. Chicago & N. W. R. Co., 167 U. S., 447, 455, 42 L. Ed., 231, 234, 17 Sup. Ct. Rep., 887; Interstate Commerce Commission vs. Baltimore & O. R. Co., 145 U. S., 263, 275, 36 L. Ed., 699, 703, 4 Inters. Com. Rep., 92, 12 Sup. Ct. Rep., 844. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. Interstate Commerce Commission vs. Cincinnati, N. O. & T. P. R. Co., 167 U. S., 479, 494, 42 L. Ed., 243, 251, 17 Sup. Ct. Rep., 896. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so

long as the established schedule remained unaltered in the manner provided by law. Cincinnati, N. O. & T. P. R. Co. vs. Interstate Commerce Commission, 162 U. S., 184, 40 L. Ed., 935, 5 Inters. Com. Rep., 391, 16 Sup. Ct. Rep., 700, 167 U. S., 479, 42 L. Ed., 243, 17 Sup. Ct. Rep., 896."

The remedy for these evils provided by Congress was the Act of February 4, 1887, with its amendments, commonly known as the Interstate Commerce Act.

By the ninth section of that act it was provided

> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must, in each case, elect which one of the two methods of procedure herein provided for, he or they will adopt."

And by section 22 existing *appropriate* common law and statutory remedies were saved.

In Texas and P. R. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, 51 L. Ed., 553, the effect of both of these provisions was considered by the court, and it was therein held that the independent rights of individuals to obtain pecuniary redress under the provisions of Sec. 9 (24 Stats. at L., 382, Chap. 104, U. S. Comp. Stat., 1901, page 3159)

> "must be confined to such wrongs as can, consistently with the context of the act, be redressed without previous action by the Commission; and the provision of Sec. 22, that nothing therein 'shall in any way abridge

or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies' cannot be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the statute."

3d point of syllabus.

It is conceded that this decision finally and conclusively denies the right of an individual to sue in any court to recover for an alleged overcharge on the pure ground that the same was unreasonable *per se*, prior to a determination by the Commission of that fact, and it was conceded in the argument that by a parity of reasoning this court would have no jurisdiction to enjoin, prior to action by the Commission, the further enforcement of an existing rate on the ground that it was unreasonable, and that its enforcement would result in irreparable damage to complainant or give rise to a multiplicity of suits; but it is strenuously insisted that the same reasons do not apply where the relief sought is against the filing and enforcement of a schedule of rates not already filed, but notice of whose filing has been given by the carrier.

To that proposition I cannot assent. To do so would be to declare that a court may have an independent jurisdiction to prevent a threatened wrong when it would have no power to award reparation for the completed injury, a proposition utterly opposed to all ideas of natural justice and the powers of tribunals. To my mind the same reasoning which so clearly shows that the power sought to be exercised by the court in the Abilene Cotton Oil Co. case was repugnant to the provisions of the Act to regulate commerce, applies with equal force to an attempt by the aid of the court, in an independent suit in equity, to prevent the filing of a schedule which it is made the duty of a carrier to file, if he desires to change his rates. To hold otherwise

would be to utterly deny to the Interstate Commerce Commission a power and duty primarily committed to it by Congress, viz.: the power and duty to decide upon the reasonableness of rates, because the jurisdiction of the Commission cannot be exercised over unfiled rates.

By the act of June 29, 1906, amending Sec. 6 of the Interstate Commerce Act it was provided *inter alia* that the Commission

> "may in its discretion and for good cause shown allow changes (in rates) upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting *and filing* of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions."

I cannot conceive of a case in which the action of a court could exert a wider or more far reaching effect in the way of invading the province of the Commission or be more repugnant to the general scope and purposes of the act than by issuing its injunction to prevent the filing of a schedule of rates with that body.

But it is suggested and pointed out in argument that the contentions of plaintiff have been practically sustained by eight courts or Judges of the United States, and denied by only three of such courts or Judges. Counsel for plaintiff cite:

Macon Grocery Co. vs. Atlantic Coast Line R. Co., 163 Fed., 746;

M. C. Kiser Co. vs. Central of Georgia Ry. Co., 158 Fed., 194;

Jewett Bros. & Jewett vs. Chicago, M. & St. P. Ry. Co., 156 Fed., 160;

Northern Pac. Ry. Co. *et al* vs. Pacific Coast Lumber Mfgrs. Assn. *et al.*, 165 Fed., 1;

and the dissenting opinion of Judge Shelby in 166 Fed., page 219 *et seq.*, as sustaining the jurisdiction of the court in a case like the present.

On the other hand they admit that the majority opinion in Atlantic Coast Line R. Co. vs. Macon Grocery Co., 166 Fed., 206, and the dissenting opinion of Judge Ross in the case of Union Pac. R. Co. vs. Oregon & Washington Lumber Mfgrs. Assn. *et al.*, 165 Fed., 13, are entirely adverse to the claim of jurisdiction in a case like the present one. It might, perhaps, be sufficient for this court to say that the reasoning in the majority opinion in Atlantic Coast Line R. Co. vs. Macon Grocery Co., 166 Fed., 206, and in the dissenting opinion of Judge Ross in 165 Fed., 13, accords with the view of this court more nearly than do any of the other cases cited. But I feel disposed to call attention to the fact that some of the cases apparently proceed upon a misapprehension of the powers of the Interstate Commerce Commission, or else upon a condition of facts totally unlike those existing in this case.

Thus in the Kiser case Judge Newman decided (page 198) that

> "the court might properly enjoin carriers from establishing or increasing to an unreasonable rate at the same time leaving the matter in such shape as that the Interstate Commerce Commission may ultimately determine whether the contemplated increase is just and reasonable."

The difficulty about such a jurisdiction is that it is utterly impracticable as applied to the present case. The Interstate Commerce Commission has been vested with no jurisdiction to determine whether a "contemplated" rate is reasonable or the reverse. Section 15 of the Act as amended June 29, 1906, limited the powers of the Commission to an investigation and action upon rates and charges "demanded,

charged or collected" by a common carrier and could have no application to rates which had not yet been filed but notice of whose filing had been given.

So that Judge Newman's opinion is no authority for the power of injunction here invoked, but on the contrary the investigation of the question of reasonableness by the Interstate Commerce Commission could never occur if injunction prevented the filing of the rates before that body. In the Jewett case, 156 Fed., page 165, Judge Carland, recognizing this difficulty, says:

> "It is only when upon complaint the Interstate Commerce Commission finds that a carrier is demanding, charging or collecting rates in violation of law that this power to interfere with the rates arises. The carrier cannot be said to be demanding, charging or collecting a rate until it has put the same into effect. It results that the Interstate Commerce Commission has nothing to do with the rates which are not in effect, or, in other words, which are not being demanded, charged or collected by the carrier."

And upon the theory that, as the Interstate Commerce Commission cannot act upon a rate not in effect, a circuit court of the United States has jurisdiction to enjoin the filing and enforcement of an alleged unreasonable rate if a proper case therefor is made, Judge Carland delivered his opinion to that effect, although dismissing the bill because it did not seek the court's determination of the alleged unreasonableness of the proposed rates.

This opinion seems clearly to predicate the power of the court to determine the reasonableness of a *proposed* rate upon the failure of the Interstate Commerce Act to provide that the Commission thereby created could suspend a rate pending investigation of its reasonableness. It may be freely admitted that this omission constitutes a defect in the

Interstate Commerce Act. In the Report of the Interstate Commerce Commission of 1908, at page 10, the following language occurs:

> "In our last annual report attention was called to the fact that this Commission had no authority to restrain an advance in rates or a change in rule or regulation which imposes an additional burden. Railways may establish whatever interstate rates they choose. No proceeding can be begun before this Commission until the schedule establishing the rate has been filed. The order of the Commission, when made, can not take effect in less than thirty days. If the investigation is to be one in reality as well as in name, if all parties are to be fully heard as they should be, several weeks, and usually several months, must elapse before a conclusion resulting in an order can be reached. Meantime the rate established by the carrier remains in effect.
>
> "No carrier should be required to reduce its rates without a fair hearing; neither in our opinion, should the public be required to pay advanced rates without opportunity for a fair hearing.
>
> "It would be easy to multiply instances and illustrations showing the confusion and discrimination which now exist. . We renew our recommendation of one year ago that this Commission be given authority to restrain the advance of a rate or the change of a rule, regulation, or practice pending proceedings before it to determine the reasonableness of the advance or the change, and we earnestly call attention to the necessity for immediate action."

It is fundamental that defects in legislation can only be amended by the legislative power, and it is not within the power of a court to extend its jurisdiction *because* the exigencies resulting from a piece of Congressional legislation may seem to demand aid. That problem is for Congress alone.

It is to be remembered, as already pointed out, that the power invoked in this case did not exist prior to the passage of the Interstate Commerce Act. And if the grant of such power cannot be found in that Act it does not exist.

The plaintiff in this bill seems to rely greatly in support of the jurisdiction here invoked upon the authority of that portion of the opinion of the Supreme Court of the United States in the case of Southern Ry. Co. vs. Tift, 206 U. S., 428, 27 Sup. Ct. 709, 51 L. Ed., 1124, wherein occurs this language:

> "In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions in view of our decision in Texas & Pacific Railroad Company vs. Abilene Cotton Oil Company, 204 U. S., 426, 27 Sup. Ct., 350, 51 L. Ed., 553, upon a different record than that before us. We are not required to say, however, that, because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates."

In most of the opinions cited by plaintiff to sustain the jurisdiction contended for, this passage has been the basis of the courts, holding that the jurisdiction existed. And, stripped of all connection with its context, the dictum might seem to give encouragement to the view that it favored the existence of the jurisdiction. But when coupled with the context, this idea is no longer tenable. Let us see what follows:

"The Circuit Court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the Commission, with its findings and conclusions, was presented to the Circuit Court, *and it was upon these, in effect, the decree of the court was rendered.* (Italics mine.) There was no demurrer to that petition, and the testimony taken before the Commission was *stipulated* into the case, and the opinions of the court recites that 'with equal meritorious purpose, counsel for respective parties agreed that this would stand for and be the hearing for final decree in equity.' "

Now it was upon *this record*, that the Supreme Court was asked to pass upon objections to the jurisdiction which, it says, upon a different record "might present serious questions"; upon a record in which the court granted no relief upon the original bill "prejudicial to appellants." A record into which was stipulated the testimony subsequently taken before the Interstate Commerce Commission upon a complaint made under the provisions of Section 15 of the Interstate Commerce Act. In view of all this, the Supreme Court proceeds:

"It was certainly competent for the appellees to proceed in the Circuit Court under section 16 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat., 379 [U. S. Comp. St., 1901, page 3165]), and to apply by petition to the Circuit Court, 'sitting in equity,' for the court to hear and determine the matter 'as a court of equity,' and issue an injunction 'or other proper process mandatory or otherwise,' to enforce the order of the Commission. We think that under the broad powers conferred upon the Circuit Court by section 16 and the direction there given to

> the court to proceed with efficiency, but without the formality of equity proceedings, 'but in such manner as to do justice in the premises,' and in view of the stipulation of the parties, recited in the decree of the court, the appellants are precluded from making the objection that the court did not have jurisdiction to entertain the petition and grant the relief prayed for and decreed."

After the above statement of the contents of the record in the Tift case, and the view of the relief granted, I fail to see how anything in the opinion of the Supreme Court can be construed into *implied* approval of the doctrine that the Circuit Court of the United States has jurisdiction in advance of action by the Interstate Commerce Commission to enjoin the filing or enforcement of rates alleged to be unreasonable.

I conclude therefore that a proper construction of the Act of Feb. 4, 1887, forbids the exercise of jurisdiction in a case like the present, because it is inconsistent with the purposes of that act as expressed therein, and as construed and expounded by the Supreme Court of the United States in the leading cases of Texas & P. R. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, and Southern Ry. Co. vs. Tift, 206, U. S., 428.

It follows from what I have said that the temporary restraining order heretofore awarded must be dissolved, and the bill dismissed for lack of jurisdiction and without prejudice.

And it is *So Ordered.*

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

IMPERIAL COLLIERY COMPANY,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY.
} No. 157. In Equity.

THE POWHATAN COAL & COKE COMPANY.
vs.
NORFOLK & WESTERN RAILWAY COMPANY.
} No. 158. In Equity.

UPON MOTION FOR DISSOLUTION OF TEMPORARY RESTRAINING ORDER.

Z. T. Vinson, E. W. Knight and Arthur B. Hayes, for Plaintiffs.

J. H. Holt, Herbert Fitzpatrick, Jos. I. Doran, for Defendants.

KELLER, District Judge.

These cases are before me upon motions, made under a special appearance by defendants, for the dissolution of the temporary restraining orders heretofore granted, because

> "as it appears from the face of the bill, the foundation of the jurisdiction is a Federal question, and not diversity of citizenship alone," and hence, that "jurisdiction cannot be entertained * * * except in the District of which the defendant is an inhabitant, and the bill further discloses that the defendant is not an inhabitant of the district where the suit is brought, but a citizen of the State of Virginia, and an inhabitant of one of the districts thereof."

I can not see how, under any theory of jurisdiction advanced by plaintiffs, the court could acquire jurisdiction over the persons of the defendants unless that question were waived by the general appearance of the defendants, and no such waiver has here been made.

> *Re* Keasbey & Mattison Company, 160 U. S., 522 (40 L. Ed., 402).

If it be contended that a suit such as the present is maintainable under the saving clause in Sec. 22 of the Interstate Commerce Act, then clearly the *place* of suit, not being fixed by any special law, is determined by reference to the general jurisdictional statute of March 3, 1875, as amended and corrected in 1887 and 1888, and the case is entirely on all fours with the Keasbey & Mattison Company case just cited, in which Mr. Justice Gray, speaking for the court, after referring to McCormick Harvesting Mach. Co. vs. Walters, 134 U. S., 41, *ex parte* Shaw ("Shaw vs. Quincy Min. Co."), 145 U. S., 444, and Southern Pac. Co. vs. Denton, 146 U. S., 202, as establishing the doctrine that

> "a corporation cannot be considered a citizen, an inhabitant or a resident of a state in which it has not been incorporated";

goes on to say (page 229):

> "Those cases, it is true, were of the class in which the jurisdiction is founded only upon the fact that the parties are citizens or corporations of different states. But the reasoning on which they proceeded is equally applicable to the other class mentioned in the same section, of suits arising under the Constitution, laws or treaties of the United States; and the only difference is that, by the very terms of the Statute, a suit of this class is to be brought in the district of which

the defendant is an inhabitant, and cannot, without the consent of the defendant, be brought in any other district, even in one of which the plaintiff is an inhabitant."

From all of the authoritative cases upon this subject that I have been able to find I have deduced the following three propositions in regard to the subject of jurisdiction as affected by the Act of March 3, 1875, as amended in 1887 and 1888:

1. That Sec. 1, Act of March 3, 1875, as amended in 1887 and corrected in 1888, has no application in its restrictive clauses, either as to place of bringing suit, or as to jurisdictional value, to causes of which the Circuit Courts of the United States had, by statutes in force at the time of the passage of the amendatory Acts of 1887 and 1888, original jurisdiction "exclusive of the courts of the several States," but is necessarily limited to the terms in which it is worded.

In re Hohorst, 150 U. S., 653 (37 L. Ed., 1211).

2. That all civil suits at law or in equity, fairly comprehended in the descriptive terms of that section, *except* such as were provided for in special and exclusive jurisdictional acts in force prior to the passage of said Act as amended and corrected, and such as have been provided for in subsequent acts conferring special (though not necessarily exclusive) jurisdiction upon the Circuit Courts of the United States, are governed by the provisions of Sec. 1, Act March 3, 1875, as amended by Act March 3, 1887, and corrected by Act August 13, 1888, in respect to place of suit and amount in controversy.

3. That the conferring of jurisdiction upon Circuit Courts of the United States by statutes which do not in terms or by

necessary implication describe such jurisdiction as "exclusive," does not have the effect of ousting the jurisdiction of the courts of the several States as described in the Act March 3, 1875, as amended in 1887 and corrected in 1888, inasmuch as said Act was a general jurisdictional statute, and prospective as well as present as to the subjects to be embraced by it; and hence that, except as specially provided in any such subsequent statute, the place of bringing suit will be governed by the general provisions found in Sec. 1, Act March 3, 1875, as amended by Acts 1887 and 1888.

In illustration of what I wish to convey I will refer to the Interstate Commerce Act. Under that Act Sec. 9 provided for a suit for damages by any person claiming to be damaged by a common carrier subject to the provisions of the act "in any district or circuit court of the United States of competent jurisdiction." Here the place of bringing suit is not pointed out, and, hence, is to be governed by the general law in force determinative of that fact. So, if a suit in equity were brought to restrain the commission of an injury of like character to those for which Sec. 9 provides a legal remedy, the same rule as to place of suit should, in my judgment, prevail.

Again in Section 22 we have the general provision that

> "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

In this case also it is manifest that the rule as to place of bringing suit must be sought either under the general law or such statutory remedies as are sought to be invoked.

On the other hand we have in Section 16 of the Act a provision of a special kind, providing its own rule as to place of bringing suit. This provision, giving remedy for

the carrier's violation or refusal or neglect to obey or perform any lawful order or requirement of the Commission created by the act, provides that such Commission or any company or person interested in such order or requirement may apply in a summary way by petition to the Circuit Court of the United States sitting in equity,

> "in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen."

Here a special provision as to place of bringing suit has been provided, and will, of course, govern; but the illustration only serves to emphasize the proposition that where no such definite provision has been made the rule as to place of bringing suit must be sought in the general statutes governing the matter.

I conclude that in these cases the court not having jurisdiction *ratione persona*, that objection, seasonably made, must prevail, and that the preliminary restraining order heretofore awarded must be dissolved as improvidently awarded, and that the bills must be dismissed, without prejudice, for lack of jurisdiction over the persons of the defendants.

UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

AT LYNCHBURG.

HOUSTON COAL & COKE COMPANY

vs.

NORFOLK & WESTERN RY. CO.

and

POWHATAN COAL & COKE COMPANY

vs.

NORFOLK & WESTERN RY. CO.

Vinson and Thompson, Chapman and Gillespie, Arthur B. Hayes and Wm. A. Glasgow, Jr., for complainants.

Theodore W. Reath, Lucien H. Cocke and John H. Holt (Joseph I. Doran on the brief) for defendant.

ARGUED JULY 2, 1909.

McDOWELL, District Judge.

In the first of these cases the bill prays that the defendant be enjoined from filing, posting or enforcing a proposed

increased freight rate on coal from West Virginia to the "Lake Ports" in Ohio, alleged to be unreasonable, and for general relief. In the second case the bill prays that defendant be enjoined from establishing such increased rate and, in the alternative, that if not enjoined from filing and posting the increased rate that the defendant be enjoined from enforcing such rate until the Interstate Commerce Commission can act on the question of the reasonableness of the proposed rate.

In both cases restraining orders were granted. In the Houston case the defendant moves for the vacation of the restraining order and in the Powhatan case the complainant moves for a temporary injunction. Both bills have been demurred to.

It seems to me unnecessary to consider any other question than that of the jurisdiction of this court to grant the relief prayed for.

The opinions of the Supreme Court in Texas & Pac. R. Co. vs. Abilene Co., 204 U. S., 426, and in Southern Ry. Co. vs. Tift, 206 U. S., 428, seem to me to leave this question open. In the former case the court had before it only the question as to the right of a shipper to recover at law for unreasonable freight charges, prior to action by the Interstate Commerce Commission. In the latter case the trial court had unquestionable jurisdiction (the Commission having acted and a petition under section 16 of the Interstate Commerce Act having been filed) before any decree prejudicial to the appellant was made. And the Supreme Court in effect merely announced that it was not in that case called upon to decide the question we are now considering. The first paragraph of the syllabus of the case is not justified by the opinion.

Of the decisions of the subordinate federal courts, it must be said that the current of opinion seems to have set in the direction of a denial of the jurisdiction. See Jewett

vs. R. C., 156 Fed., 165; Kalispell Lumber Co. vs. R. Co., 157 Fed., 845; Kiser Co. vs. R. Co., 158 Fed., 193; Macon Grocery Co. vs. R. Co., 163 Fed., 736; Northern Pac. R. Co. vs. Pac. Lumber Co., 165 Fed., 1; Union Pac. R. Co. vs. Oregon Lumber Co., 165 Fed., 13; U. S. vs. R. Co., 122 Fed., 544; U. S. vs. R. Co., 142 Fed., 176, 187; Potlatch Lumber Co. vs. R. Co., 157 Fed., 588; R. Co. vs. Kalispell Lumber Co., 165 Fed., 25; R. Co. vs. Macon Grocery Co., 166 Fed., 206; Columbus Co. vs. K. & M. Ry. Co., 171 Fed., 713.

The first question is as to the power of this court to enjoin the establishment of the proposed rate.

It seems to me that the Interstate Commerce Act shows that Congress intended to give to the Commission the sole jurisdiction to pass upon the reasonableness of a rate in the first instance. If this court assumes jurisdiction to enjoin the filing and posting of a rate, it is clear that no case for the action of the Commission could arise. A bill which prayed solely for a temporary, and finally a permanent, injunction forbidding a carrier to file and post an interstate rate would be a pure injunction bill, in no sense ancillary, and before the permanent injunction could issue, at least, the court must investigate and determine the unreasonableness of the proposed rate. By necessary implication as it seems to me the language used in the Act forbids that the court can have such power. Its exercise effectually and finally dispenses with action by the Commission.

In U. S. vs. R. Co., 122 Fed., 545, 546, it is said:

> "In a recent case coming up from Kansas, the Supreme Court denied the right of the government to maintain a suit somewhat similar to this. But in that case, the Interstate Commerce Commission had never granted a hearing, or made an order, in the matters involved. The Commission is the tribunal instituted by the government to inquire primarily into the fact as to whether discrimination exists. To it the shipper

> can bring his grievances; before it the railroads have a right to be heard. Until an inquiry is there made, and a finding and order had, the jurisdiction of a court of equity may not be invoked, because for the court to take hold, at that primary point in the case, would be to transfer the jurisdiction of the Interstate Commerce Commission—the jurisidction to first inquire into the facts—to a court of equity. In practical application, it would abolish the Interstate Commerce Commission and devolve upon a Master in Chancery the preliminary inquiry into the facts. Because of this—though the reason is not stated by the court as I have stated it—the Supreme Court held that the suit thus before it could not proceed except under the Elkins act subsequently enacted; but no opinion was expressed upon the right of the government to bring suit in cases where there had been a preliminary inquiry and finding by the Interstate Commerce Commission."

The case therein referred to is supposed to be Missouri Pacific Ry. vs. U. S., 189 U. S., 274, 282.

Let us now consider the power of the court to enjoin a carrier from enforcing a rate that has been filed and posted, but which has never been enforced. The theory on which such relief is asked is that the carrier will proceed to file and post the new rate, and that the court will merely enjoin the enforcement of the new rate until the Commission can act on the question of the reasonableness of the rate.

For argument's sake, and without considering the question, it is assumed that the federal circuit courts had equity jurisdiction, prior to the enactment of the Interstate Commerce Act, to enjoin a carrier from enforcing an unreasonable interstate rate. Does not the Act by necessary implication repeal the power? It seems to me that it does. If the new rate is filed and posted for the requisite period such rate is "established." If enforcement of such rate is en-

joined, what rate can the carrier enforce during the period of injunction? It is argued that the former rate can be used. But the filing and posting of the new rate establishes it, and a charge of a less rate is forbidden by the Act both as originally expressed and as amended. "When a schedule of rates is once established in the mode prescribed by the statute, a former rate is superseded and is no longer in existence." R. Co. vs. Kalispell Co., 165 Fed., 25, 28. Obviously a power in the courts to enjoin the enforcement of a rate which has been duly established, prior to action by the Commission, is totally at variance with the expressed intent of the law.

Again, by section 15 of the Act, as amended, the Interstate Commerce Commission is only given jurisdiction to pass upon the reasonableness of a rate after such rate has been "demanded, charged or collected." This language does not comport with an intent to leave in or give to the courts a jurisdiction to enjoin the enforcement of a rate which has been filed and posted. For if such injunction be granted and obeyed the new rate can never be demanded, charged or collected. It was said in argument that the Commission had in an unreported ruling held that it had jurisdiction to inquire into the reasonableness of a rate prior to its enforcement. But on a careful reading of the statute I am unable to agree to the soundness of such a conclusion. I do not find in the Act that a carrier violates the law by merely filing and posting an unreasonable rate. The carrier may, by so doing, put itself in a position where it can do no business without violating the law; but until the carrier has not only established an unreasonable rate but has demanded, charged and collected such rate, it has not violated the Act, and has not done such an act as gives the Commission jurisdiction to pass on the rate. Here again the expressed intent of the Act is obviously at variance with an intent that the court shall have (or retain) a power to enjoin the enforce-

ment of an established rate prior to action by the Commission; and the exercise of such power would dispense with and prevent action by the Commission.

Perhaps a word or so should be devoted to the clause in section 22 of the Act reserving existing remedies at common law. Assuming without so holding that there was jurisdiction to enjoin the enforcement of an unreasonable rate, and that this clause refers to equitable remedies, still the decision in the Abilene case, *supra*, makes it impossible to construe this clause according to the contention of complainants. If section 22 does not preserve an admittedly existing common law right of recovering damages for excessive charges previous to action by the Commission, *a fortiori* this section does not preserve a disputed equitable right which nullifies the chief conception and intent of the Act as a whole.

In the argument that the proposed action of the carrier is the result of a conspiracy to violate the Interstate Commerce Act I can find no addition to the strength of the case of the complainant. As there is no jurisdiction to enjoin the enforcement of an unreasonable rate, the mere fact that the intent to enforce the unreasonable rate was born of a conspiracy does not alter the essential nature of the case. We still have a request that the court enjoin the enforcement of a rate said to be unreasonable prior to action by the Commission.

The argument based on the Anti-Trust Act of July 2, 1890 (26 Stats., 209; 7 Fed. Stats., Ann., 336), assumes the existence of a right in private individuals to invoke the power given the courts by section 4 of the Act. The language used by the Supreme Court in Minnesota vs. Northern Securities Co., 194 U. S., 48, 71, seems to destroy the basis for this argument. Again it is a seemingly unanswerable argument against such assumption, that if the power exists in individuals to enjoin the enforcement of a freight rate, previous to action by the Interstate Commerce Commis-

sion, the Anti-Trust Act largely destroys the fundamental scheme of the Interstate Commerce Act. It seems to me most improbable that Congress had any such intent. And the language used in the Elkins Act of February 3, 1903 (32 Stats., 847; 10 Fed. Stats., Ann., 170), and in the Amended Interstate Commerce Act of June 29, 1906 (34 Stats., 584; Supp. Fed. Stats., Ann., 168), seems to clearly show that such intent either never existed or has been abandoned.

The objection to the two bills at bar based on the failure to allege facts showing irreparable injury or the necessity of a multiplicity of actions are undoubtedly of much strength. However, I have not thought it necessary to enter upon a discussion of these questions.

It follows from what has been previously said that this court is without jurisdiction to grant any relief whatever under either of the bills here.

CITY COURT OF ANNISTON.

ANNISTON ELECTRIC & GAS CO.

vs.

SOUTHERN RAILWAY COMPANY.

The evidence shows without controversy that the railway company has for some years granted a rate on coal, ranging from fifty cents to sixty-five cents from certain groups of mines to a number of manufacturing plants in Anniston, while the rate to plaintiff and all other persons in Anniston from the same groups has been about twenty cents higher, except that for a few months plaintiff was granted the special rate. The rate granted plaintiff is the general rate, and the rate granted the manufacturing plants above referred to is a special rate. These rates, both general and special, have been regularly published by the defendant company.

The plaintiff contends that the general rate is unreasonable and excessive; that it is unjustly discriminatory, in as much as plaintiff, as part of its business, manufactures and sells motive power (using coal to manufacture the power), and is, therefore, in competition with all industrial plants which manufacture power for their own use from coal; that it is an arbitrary discrimination based on no just grounds for a discrimination; that Section 8 of the Acts of February 23, 1907 (Acts, page 117), prohibits any difference in rates, whether grounds for discrimination exist or not; that Section 14½ of Act of November 23, 1907 (Acts, page 40),

require that any special rate must be first approved by the Commission before it is legal.

Taking up these propositions in the order stated, I am of the opinion that none of them can be sustained to the extent of authorizing a recovery by plaintiff for freight paid defendant. Since the adoption of the Act of February 28, 1903, relating to the powers and duties of the Railroad Commission, it must be held that the authority then conferred on the Commission, and the procedure there provided, supersedes a common law jury trial as to the reasonableness of rates. And what is true as to that Act is true as to those since adopted. In fixing rates, the Railroad Commission is performing a *legislative function*, that of prescribing a general rule of conduct to govern future action. It is a judicial function to determine the rights of parties under some existing rule of conduct. It is inconceivable that the Legislature contemplated that a rate fixed by the Commission might be abrogated in any given case by the verdict of a jury which might happen to differ with the Commission as to reasonableness. This question is so fully considered in the opinion of Justice White in the case of T. & P. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, that nothing of consequence can be added to the discussion.

The Act above referred to makes it mandatory on the Railroad Commission to revise all tariffs, and upon the railroads to publish all tariffs. My opinion is that a published tariff has the force of a law until revised by the Commission. But if not, the evidence shows that the general rate charged plaintiff was approved by the Commission some years ago, prior to the beginning of the transactions in controversy. Section 15 of the Act of 1903, page 10, Sec. 9 of the Act of Special Session, page 38, and Section 13, page 40, make all orders, proceedings, judgments, official documents in the office of the Railroad Commission, competent evidence in any suit or proceeding in any court or before any officer. Such

orders, etc., are not limited as evidence to proceedings between same parties as appears before the Commissioners. All such orders, etc., are *prima facie* correct. It can, of course, make no difference that the personnel of the Commission was not the same at the time of the making of the orders as at present. The Commission is a unity, just as much as a court.

Even if this court has the power to decide the question of reasonableness the evidence is not sufficient to show that the general rate charged plaintiff is excessive. A mere difference of rates proves very little. Special rates are common, and are sanctioned by the Acts of the Legislature. It is general knowledge that railroads foster industries by granting special rates, in order to build up shipping communities, thereby benefiting both themselves and vast numbers of people. It is a very simple policy and its advantage is very apparent.

The fact that the railroad grants to Talladega or other communities having a larger haul the same general rate granted to Anniston, and the fact that the railroad grants the same rate to Anniston on a haul of one hundred and twenty-five miles as it does on a ninety-mile haul, does not prove that the charge for the larger haul is the reasonable charge, and the charge for the shorter haul unreasonable. The shortest haul necessarily fixes the rate, in the absence of an illegal combination. A strict mileage basis would restrict trade to only a few mines. It is but just that competing mines have the same rate, notwithstanding a difference of mileage, if the difference is not great. I see no just ground for finding that the general rate on coal charged to plaintiff and other consumers is in itself excessive. Nor am I able to hold that there is any unjust discrimination in granting to the manufacturing plants a special rate of from fifty cents to sixty-five cents while the general rate is from seventy cents to eighty-five cents. Whatever may have

been the common law decisions of the courts, the laws of Alabama prevent arbitrary discrimination and arbitrary discriminations are just as illegal as those which are positively hurtful. The evidence shows that the special rate is limited to manufacturing enterprises having large quantities of outgoing freight, of which the railroads get the benefit. And the evidence further tends to show that generally these manufacturing enterprises are in competition with others situated nearer the coal mines and which have a lower rate for coal than the general rate to Anniston. The plaintiff's business is principally furnishing gas and electricity for lighting in Anniston and running a street car system in Anniston and vicinity, and it also sells electricity as motive power to industrial plants. Its outgoing freight is comparatively small, consisting of small quantities of coke. In view of these facts, it cannot be said that the difference in rates is an arbitrary discrimination. The special rate is of great benefit to this community, and no doubt of considerable value to the railroad; it is based on the same general principle here as we would expect to find everywhere, and carries but the idea in the mind of the Legislature where the latter expressly provided that special rates might be allowed. Special rates under similar circumstances to the case at bar have been frequently approved by the courts. The cases of L. & N. vs. Commonwealth, 57 S. W., 508, and Hoover vs. Railroad Co., 27 Atl., 282, discuss this question fully, and are, it seems to me, sound in their reasoning and conclusion. There are numerous cases bearing on the question, but the principle stated above seems to be universally accepted, and citation of authorities is unnecessary.

But plaintiff contends that it is in competition with all other industrial plants in Anniston which manufacture motive power for their own use from coal in as much as plaintiff, paying seventy cents for coal, cannot manufacture and sell power to a plant which buys coal at fifty cents and manu-

factures its own power. It is probably true that under the difference in rates plaintiff cannot sell motive power to such manufacturing plants. And it is probably true that plaintiff, by manufacturing all or a greater portion of the power used in the plants in Anniston, could manufacture it more cheaply than could each plant for itself if plaintiff had the same rate. I can see nothing in plaintiff's contention more than an effort to get a lower rate in order that it may extend its market. After an investigation of the cases, I cannot find where the point now raised by plaintiff has ever been considered, and plaintiff cites no cases on the question. The Hilton Lumber Co. case, 6 L. R. A., 225, was a case of competition between shippers of lumber. Here the competition is alleged to exist between a seller and a possible purchaser. As suggested at the hearing, to hold that this is competition would lead to the ruling that the citizen with a kitchen garden for home consumption is in competition with the market gardener or green grocer. And it might be added that the citizen with a pig in his stye is in competition with Swift & Co. or Armour & Co. It would then logically follow that to put these competitors on an equality, the same license or privilege tax should be placed on the home garden or private pig stye as on the green grocer or fresh meat dealer. But there is no competition in any legal meaning of the term. No person or industry is engaged in manufacturing motive power for sale, except plaintiff. Plaintiff has no competition in business. It is, at most, a question of business policy whether a special rate shall be allowed plaintiff, something entirely outside of the province of the court. The courts, and the Railroad Commission as well, may, in proper cases, approve special rates, but they cannot compel them. The question of arbitrary or unjust discrimination is one for the courts. Neither the Legislature nor the Railroad Commission could make rates which are unjustly discriminatory. Competition is not always necessary as a condition under

which different rates become unjust; but generally it is the condition under which relief has been sought in the courts. Competitors, in a legal sense, necessarily constitute a class. A dealer and a purchaser are in different classes. Suppose the special rate now allowed the manufacturing industries in Anniston should be granted to plaintiff and plaintiff should begin to "compete" (in the sense in which plaintiff uses the term) with such manufacturing industries, by trying to sell them power. Evidently there would be no rivalry on the part of the manufacturing plants. Their only interest would be to get power as cheaply as possible. Instead of having an interest in a higher rate to plaintiff, their interest would be to have the rate to plaintiff as low as possible—a peculiar situation to speak of as competition or rivalry in coal rates. While the mind can conceive of the application of the term "competition" to the relation between plaintiff and the manufacturing industries, it is only in a figurative sense. There is no rivalry. These manufacturing plants have no interest in the rate to plaintiff, or if they have, their interest is identical with plaintiff's in having a low rate for the latter, the lower the better for them. Competition, in the true sense of that term, can exist only between those whose interests are in conflict.

Section 8 of the Act of February 23, 1907, requires the same rate for "like service." Plaintiff contends that by this section the railroad is required to haul coal at the same rate for every customer where the service rendered by the railroad is the same. Plaintiff overlooks, it seems to me, the very plain provisions of Section 11 of the same act, wherein it is provided: "Nothing in this Act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions, and shall be subject to the provisions of this Act as to printing and filing same; provided, all such

rates shall be under the supervision and regulation of the Railroad Commission." I cannot imagine language plainer than this. The special and general rates were published as required. The Railroad Commission has not revised them. As already stated, "the conditions," under all of the authorities which I have seen, are not "similar" as to plaintiff and the public generally on the one hand, and as to the manufacturing plants having special rates, on the other hand. I do not think the Legislature by the Sections 8 and 11 of the Act above referred to, meant to prohibit special rates. On the contrary, I think the Legislature meant to authorize such rates.

Plaintiff also contends that under Section 14½ of the Act of November 23, 1907, page 40, of Acts of Special Session, the Legislature intended to prohibit all special rates unless expressly authorized by the Railroad Commission. This section provides, in substance, that the Commission, of its own motion or upon application, may establish commodity rates from specified zones to specified points of destination, if given to all persons engaged in the same enterprise in the localities affected, and provides further that such special rates must first be approved by the Railroad Commission before being legal.

I think it must be clear upon a moment's reflection that this law is prospective and not retroactive. The probability is that this section was rendered desirable by the fact that at the time of its adoption laws were enacted fixing the rates on a number of commodities on a mileage basis. The rates so fixed were left subject to change by the Railroad Commission. However that may be, it is not reasonable to think that by Section 14½ above referred to, it was the intention of the Legislature to repeal or abrogate all then existing special rates. Such special rates published by the roads were "laws" until changed by some competent authority. I think it is fair to assume that it was the purpose

of the Legislature to leave such special rates or "laws" in force until changed by the Commission or by some act of the Legislature. I think this is far more reasonable than to assume that it was intended to repeal every special rate then in force until the Commissioners could investigate and allow or disallow them.

As I have been able to recall argument of counsel, the above is a review of all the points raised by plaintiff's attorneys. The question of voluntary payments has been omitted because unnecessary to a determination of the case.

Judgment will be rendered for defendant.

September, 1909.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 710.

MACON GROCERY COMPANY, et al.,
Appellants,

VS.

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,
Appellees.

Appeal from the United States Circuit Court of Appeals, for the Fifth Circuit.

STATEMENT, BRIEF AND ARGUMENT OF COUNSEL FOR THE APPELLANTS.

QUESTIONS INVOLVED.

The great question presented by the record in this case is whether the Act to Regulate Commerce has the effect of depriving a court of equity of its inherent right and power to enjoin an unjust, unreasonable, and unlawful advance in freight rates, in order to prevent irreparable injury and avoid a multiplicity of suits. The Circuit Court found that this jurisdiction in equity remained unimpaired; while the Circuit Court of Appeals (Judge Shelby dissenting) adopted the view that the exercise of this power would be destructive of the purposes of the Interstate Commerce Act, and therefore, by implication, had been withdrawn from the courts.

Another interesting question involved concerns the character of the jurisdiction of the Federal Courts over causes of action arising out of the Act to Regulate Commerce, or the Sherman Anti-Trust Act:—Whether such jurisdiction is exclusive in the Fed-

eral Courts, or concurrent with that of the State Courts.

STATEMENT OF THE CASE.

The appellants are wholesale dealers in heavy groceries, food products, and other similar commodities. They, and each of them, reside and do business in various cities and towns within the Southern District of Georgia. The appellees are common carriers engaged in interstate commerce, maintaining and operating continuous lines of railway from Ohio and Mississippi River crossings to Southeastern points within the States of Georgia, Florida and Alabama.

The appellee railway companies on June 27th, 1908, filed notice with the Interstate Commerce Commission that on August 1st, 1908, an advance would be made effective in the rates on certain commodities and classes of traffic from Ohio and Mississippi River crossings, Nashville, Tennessee, and points with relation thereto, to Southeastern destinations as follows:

Grain, grain products, and hay	2 cts. per hundred pounds.
Fresh meats, C. L., packing house products	3 cts.
Class B	3 cts.
Classes C. and D.	2 cts.
Class F. (flour in barrels)	4 cts. per barrel.

Among the articles included in Class B, are salt meat, in bulk, car load; cured packing house products (hams, shoulders, sides, beef, pork, lard, pigs' feet, tripe, canned meats, sausage, etc.), and other related articles.

Trans. pages 42-43.

Class C. includes flour in sacks, not otherwise specified.

Trans. page 43.

In Class D. are found bran, shorts, ship stuff, linseed cake, cerealine (for brewing), excelsior, grain in sacks, brewers' grain, corn, oats, rye, wheat, in bulk C. L., hay, fodder and straw C. L., corn meal, linseed oil meal, and various other similar commodities.

Trans. pages 41, 42.

Class F. is composed of flour and grits in barrels.

Trans. page 42.

After notice had been filed with the Interstate Commerce Commission, but before the rates became effective, the appellants on July 25th, 1908, presented to the Circuit Court of the United States for the Southern District of Georgia their bill in equity praying an injunction against an enforcement of the proposed advanced rates, upon the ground that the advance was the outcome of an unlawful conspiracy between the carriers; that the rates prescribed were unreasonable and unjust; and that their enforcement would occasion irreparable injury to appellants and other shippers. The suit was brought by appellants in their own interest and in behalf of "all other persons, firms, and corporations similarly situated with respect to the subject matter of this suit, or interested in, or affected thereby."

Trans. page 3.

Original Bill.

The averments of the bill are substantially as follows:

Each of the defendant railway companies (appellees) is a member of the Southeastern Freight Association, which Association was organized and is maintained under agreements and for purposes which

constitute an illegal combination in restraint of interstate trade, and for the fostering of monopoly, in destruction of fair competition among carriers engaged in interstate trade. The said railway companies, by a concurrence of action, and through the medium of the Southeastern Freight Association, can and do fix and maintain rates from Ohio and Mississippi River crossings to Southeastern destinations in Georgia, and other States. The Louisville and Nashville Railroad Company has continuous lines over its own rails from Cincinnati, Louisville, Evansville, St. Louis, Memphis, and Nashville to Atlanta, and as one of the lessees of the Georgia Railroad has entrance into Athens, Macon and Augusta; the Nashville, Chattanooga & St. Louis Railway maintains and operates a through line from the Ohio River at Paducah, Kentucky, and from the Mississippi River at Hickman, Kentucky, and at Memphis via Nashville, to Atlanta; the Atlantic Coast Line Railroad Company, as one of the lessees of the Georgia Railroad, has direct connection with the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway, and over its own line of railway reaches many important destinations in South Georgia and Florida; the Southern Railway Company, in connection with the Cincinnati, New Orleans & Texas Pacific Railway Company, maintains and operates through lines from Cincinnati, Louisville, and St. Louis to Atlanta, Macon, Columbus, and many other important points of destination within the State of Georgia.

Trans. pages 3 and 4; Original Bill, paragraph III.

The Nashville, Chattanooga & St. Louis Railway is owned or controlled by the Louisville & Nashville Railroad Company through the ownership of a majority of its capital stock; the Atlantic Coast Line Company, a holding Company organized under the laws of the State of Connecticut, owns or controls both the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, thus

constituting one large system of railway lines. The Cincinnati, New Orleans and Texas Pacific Railway Company is owned or controlled by the Southern Railway Company, through the ownership of stock or otherwise, and is to all practical intents and purposes a part of the Southern Railway system. There is no system, other than those mentioned, that has its own lines extending from the Ohio and Mississippi River crossing, Nashville, Tennessee, and points made with relation thereto, to Southeastern destinations within the State of Georgia. Owing to the fact that the Southern Railway system and the Louisville & Nashville system have such continuous lines from the Ohio and Mississippi Rivers to Southeastern destinations, they can and do fix and maintain the rates between such points. The Southern Railway system and the Louisville & Nashville system are natural competitors, so that any combination, agreement, or understanding between them whereby rates are advanced and maintained, is in suppression of competition.

Trans. page 4; Original Bill, paragraph IV.

During the year 1904, and prior thereto, much discontent existed with respect to railroad rates of freight from both eastern and western points of origin to Atlanta and other points made with relation thereto, which include Macon, Columbus, Albany, Montezuma, Americus, Cordele, Georgia, and other points.

The question of a reduction in freight rates to Atlanta, and related points, was made the subject of a conference between a citizens committee of the city of Atlanta and a committee of traffic officials of the railway lines initial at Atlanta. The whole body of rates, both from eastern and western points of origin was discussed, and a general readjustment arrived at. The rates on the commodities and classes of traffic involved in this suit from Ohio and Mississippi River crossings to Atlanta and related points,

were considered, and substantial reductions were made. These reductions were made not only to Atlanta, but extended to Macon, Columbus, Albany, and other points related with Atlanta. Subsequently, the affected railway companies prepared and issued, effective February 1st, 1905, their freight tariffs incorporating these reduced rates, in which each of the appellees joined and concurred.

Trans. page 5; Original Bill, paragraph V.

The reduced rates thus put into effect on February 1st, 1905, have since been maintained, and under them a large and important traffic has moved. These rates were satisfactory to the shippers and remunerative to the carriers. During the series of years that these rates were maintained, business and trade conditions became adjusted thereto, to the benefit of the carrier, the shipper, and the public, all of whom prospered thereunder.

Trans. page 5; Original Bill, paragraph VI.

Prior to the first of June, 1908, some of the carriers began a concerted movement looking to an increase in the rates involved in this suit. It was recognized that each of the two great systems maintaining and operating lines from the river crossings to Southeastern territory must unite in any proposed increase; and in order to fully accomplish this purpose the intervention of the Southeastern Freight Association was sought and employed. The Louisville & Nashville Railroad Company, the Atlantic Coast Line Railroad Company, and the Southern Railway Company, composing the two natural competing systems, joined in and filed with the Southeastern Freight Association, what is known as a declaration, announcing that on August 1st, 1908, they would make effective an advance in rates on Classes B., C., and D., fresh meats, C. L., grain, grain products, hay, and packing house products from Ohio and Mississippi River crossings, Nashville, Tennessee, and points with relation thereto, to Southeastern

points. The advances announced were: On grain, grain products, hay, Classes C, and D., 2 cents a hundred pounds; on Class B., fresh meats, C. L., and packing house products, 3 cents a hundred pounds, and on Class, F., 4 cents a barrel. This declaration, which was also joined in by the Central of Georgia Railway Company, was communicated by the Chairman of the Southeastern Freight Association to each of the interested lines of railway in the form of a circular designated "Information Issue No. 517." This concurrent action on the part of the two systems of railway effectively suppressed competition, and forced all connecting carriers either to concur or give up the traffic. All interested lines did concur, acting in this regard through the agency of the Southeastern Freight Association. Subsequently both the Louisville & Nashville system and the Southern Railway system filed with the Interstate Commerce Commission its freight tariff embodying the advance in rates above mentioned, to become effective on August 1st, 1908. In each of these tariffs practically every interested line joined as a participating carrier, a list of such participating lines, numbering seventy-three, being shown in the tariffs. (Trans. page 5 and 6; Original Bill, paragraph VII.) Information Issue No. 517 will be found on pages 29 and 30 of the Transcript.

The bill briefly set outs the methods employed by the Southeastern Freight Association in the regulation of rates, and avers that the advance complained of was the direct outcome of understandings and agreements in suppression of competition, and an unlawful combination in restraint of interstate trade, arrived at and made effective through the agency of the Southeastern Freight Association, and other affiliated freight associations; and that the act of such combination in advancing rates is the result of a conspiracy which is unlawful as well at common law as under the statute of the United States.

Trans. pages 6 and 8; Original Bill, paragraph VIII.

For their supply of the commodities affected by the advance, dealers and the public in the Southeastern States depend largely upon the producing territory reached through the Ohio and Mississippi River crossings. The proposed sharp advance in the rates complained of will seriously disturb existing trade relations, causing loss to shippers and injury to the consuming public. It is estimated that the advance would represent a charge or tax to the dealers and the public in the State of Georgia of not less than $500,000, and probably in excess of $1,000,000 annually. The affected commodities being staple articles of daily necessity are sold upon such narrow margin of profit as will not permit the dealer to absorb the entire advance, so that the consuming public will be forced to bear some portion of this additional tax through a proportional increase in prices. The effect of the increase in rates will be to restrict the volume of traffic, reduce the business of dealers, and deprive the consuming public, or some part thereof, of the ability to purchase and use these commodities to that extent to which they are entitled; all of which will be to the irreparable loss and injury of complainants (appellants) and others similarly situated, and to the prejudice of the public interest. The legal remedy is inadequate for that the loss and damage resulting from the exaction of unjust and unreasonable rates, and the consequent restriction of business, is a constantly recurring grievance incapable of pecuniary estimation. Reparation in damages would be inadequate to compensate for the loss and injury suffered; nor would the right to threefold damages, authorized under the Sherman Anti-Trust Act, be adequate. The enforcement of these remedies would also bring about both a multitude and a multiplicity of suits.

Trans. page 8; Original Bill, paragraph IX.

The proposed advance is not a compensatory charge to fairly meet the cost and value of the service to be performed by the carriers, but is an arbitrary and unlawful exaction. Under the former rates the traffic moved freely and the carriers prospered until the coming about of the abnormal conditions which followed the financial panic of October and November, 1907. For some months thereafter the volume of railway traffic greatly declined, resulting in loss to the carriers of both gross and net earnings. This loss was due to a decrease in the volume of all traffic, and was not attributable to the rates upon the commodities and classes of traffic forming the subject matter of the advance. The net earnings of the carriers have in recent months shown a decided advance. In some cases they show net earnings exceeding those for the corresponding months of the preceding year, and there is every reasonable expectation that normal conditions will soon be restored. The carriers have no right to take advantage of an abnormal condition, which in its nature is transitory, in order to make advances in rates upon commodities of great utiltiy and necessity, and more specially so when the preceding rates had been demonstrated by actual trial for a series of years to have been compensatory under normal conditions.

Trans. pages 8 and 9; Original Bill, paragraph IX.

The prayers of the bill are: (a) For a rule nisi and temporary restraining order; (b) for injunction pendente lite; (c) for perpetual injunction; (d) for discovery; (e) for general relief, and (f) for process.

Trans. pages 8 and 9, paragraph X.

Upon this bill the Court issued a rule nisi, and granted a temporary restraining order.

Trans page 12.

Plea to the Jurisdiction.

The cause came on to be heard under the rule on

July 29th, 1908, the Honorable Emory Speer, District Judge, presiding. Each of the defendants (appellees), entered a special appearance and pleaded to the jurisdiction of the Court over the persons of the defendants, on the ground that each of them was a corporation of a State other than Georgia, and therefore not a citizen or inhabitant of the Southern District of Georgia, and that the suit being one in which the jurisdiction was not founded upon diversity of citizenship only, but also upon the federal question arising out of Act to Regulate Commerce, the defendants were not subject to be sued in this district.

Trans page 15-21.

To these several pleas the complainants (appellants) demurred upon the ground that the controversy was wholly between citizens of different States and that the jurisdiction was founded only upon the fact of diversity of citizenship. (Trans. p. 160.) After argument of counsel, the Court overruled these pleas to the jurisdiction, although evidently not upon the ground set out in the demurrer to the pleas.

Trans page 108-110.

Demurrer to Bill.

The defendants (appellees) then presented their joint and several demurrer as cause in law why the relief prayed should not be granted. In addition to the general grounds of want of equity and the existence of an adequate remedy at law, the demurrer challenged the jurisdiction of the Court over the controversy upon the following grounds:

(a) That private persons are not competent to maintain a suit concerning rates of charges for interstate transportation, without some representative of the public being a party to the record, or without previous action by the Interstate Commerce Commission.

(b) That the suit is not authorized by any statute or law of the United States:

(c) That by virtue of the Act to Regulate Commerce the Interstate Commerce Commission has original and exclusive jurisdiction over all matters affecting interstate rates:

(d) That in so far as the bill seeks to enjoin an alleged unlawful conspiracy, or combination in contravention of the Sherman Anti-Trust Act, the suit can not be maintained for that such right of action is vested exclusively in the United States:

(e) That for the Court to enjoin the advance would be in effect to fix as maximum rates those then prevailing; which would constitute the exercise of legislative and not judicial power, and would be a usurpation of the power and authority delegated to the Interstate Commerce Commission under the Act to Regulate Commerce, and its amendments.

Trans. pages 22-24.

The complainants (appellants) submitted proof in support of the averments of their bill. (Trans. pp. 26-107.) The defendants (appellees) declined to answer to the merits or to offer evidence, but stood upon their demurrer as cause in law. The cause was argued by counsel for the respective parties, after which the Court took the matter under advisement. On the following day (August 1st, 1908) the opinion of the Court was handed down, announcing that the restraining order would be continued in effect, subject to the further order of the Court, upon condition that the complainants should within ten days apply to the Interstate Commerce Commission to pass upon the reasonableness of the rates involved and take such action with regard thereto as the Commission should deem in accordance with the law and the rights of the parties.

Trans. pages 110-130.

Findings of Fact by the Trial Court.

In addition to the allegations of the bill, which

were admitted by demurrer, the trial court, upon the proof submitted, made certain findings of fact which are embodied in the statement of the case.

Trans. pages 116-121; 163 Fed. 742-46.

1. A conference looking to a readjustment in freight rates both from the east and the west to Atlanta and related points took place at the Piedmont Hotel, in the City of Atlanta, during the months of November and December, 1904, between a committee appointed by the Mayor of Atlanta and the traffic officials of the various lines serving Atlanta. The points related in rates with Atlanta included Macon, Columbus, Athens, Augusta, Rome, Albany, and other towns and cities in Georgia.

Trans pages 35-6; 116.

The reductions proposed by the railway officials included a uniform reduction of 2 cts. a hundred pounds on meats, grain, and flour. (Trans. p. 39; 116.) The reductions proposed represented a compromise reached between the lines serving Atlanta and the lines having no direct interest in Atlanta. These reductions were fully considered by the highest officials of the respective lines at their several meetings. (Trans. pp. 39, 40; 117.) It was estimated that the amount of flour, hay, grain, and mill feed coming to Atlanta alone was about 12,000 cars of twenty tons each per annum.

Trans. page 117.

The new rates carrying the reduction were made effective February 1, 1905.

Trans. page 117.

2. The rates from Ohio River crossings to a number of towns in Georgia as compared with the rates in effect prior to the reduction following the Atlanta conference, and with those set out in the proposed advance, showed among other things the following:

To the City of Macon on the commodities included

in Class B, the rate prior to 1905 was 37 cents per hundred pounds; the present rate is 35 cents; and the proposed rate is 38 cents, showing an advance of three cents per hundred pounds upon the rate now paid by complainants, and one cent per hundred pounds above that paid in 1904. For Classes C, and F, the rates will revert to those paid in 1904, but these will be an advance above the present rates of 2 cents, and 4 cents, for the respective classes. For Valdosta merchants there will not only be an advance of 3, 2, 2, and 4 cents for Classes B, C, D, and F, above the present rates, but for Classes B, C, and D, an increase of one cent per hundred pounds above those paid before the Atlanta conference. For Atlanta merchants the increase from the present rates will be 3 cents for Class B, 2 cents for C, 2 cents for D, and 4 cents for F, and for Class B, the proposed advance is one cent per hundred pounds in excess of freight paid in 1904. For Athens merchants there will be the same increase of 3, 2, 2, and 4 cents above the present rates, and one cent for Class B; for Columbus merchants, the same advances, and the same for Rome merchants. On shipments of fresh meats for all of these cities the increase is 3 cents per hundred pounds above the present rate, and one cent above those effective in 1904. The rate on flour in sacks is increased 2 cents above the present cost, and for Valdosta one cent per hundred pounds over that of 1904.

Trans. pages 43-4; 117-18.

3. Extracts from Poor's Manual of Railroads tended to show that the defendants were grouped, as the bill alleged, in two great systems, one controlled by the Southern Railway Company, and the other by the Atlantic Coast Line Company, and that the lines of the defendants extended throughout all the territory described in the bill.

Trans. pages 51, 53; 117.

4. The net earnings of the Southern Railway for

the months of March, April and May, 1908, show an increase over the corresponding months of the preceding year, 1907, as follows: For March an increase of $234,000; for April an increase of $339,000; for May, $90,000. The Traffic Manager of the Railway Company claimed that these results were accomplished by drastic reduction in expenses.

Trans. page 118.

5. The Western & Atlantic Railroad, of which the Nashville, Chattanooga & St. Louis Railway is a lessee, and over which the Louisville & Nashville has trackage rights, showed the following net earnings from July, 1907, to May, 1908, inclusive: $623,907.76; for the same months of 1906 and 1907, $592,475.31; and for the same months of 1905 and 1906, $625,-792.06.

Trans. page 120.

6. Bank clearings in all of the principal cities of the country for the week ending July 5th, 1908, as compared with the corresponding period of the preceding year, showed a smaller per centage of decrease in the Southern group than for the entire country.

Trans. pages 119-20.

7. The threatened increase in rates will impose an additional transportation cost of from $500,000 to $750,000 a year to merchants in the State of Georgia; and from $35,000 to $65,000 to merchants in the City of Macon alone.

Trans. pages 120-21.

8. Following the Atlanta conference and the subsequent reduction in rates, a large traffic has moved, trade relations have become adjusted thereto, and contracts have been entered into, so that the enforcement of the advance in rates would cause serious loss to both the consumer and the dealer.

Trans. page 120.

9. The margin of profit to the dealer on the affected commodities is very small, and while it would be possible for him, by increasing prices, to absorb a part of the increase in freight rates and pass the same along to the consumer, it would be impossible, at least until conditions adjusted themselves, to absorb the entire increase in freight rates; and in this manner a large loss would ensue to the dealer and consumer.

Trans. page 120.

The largest part of the supply of the affected commodities consumed in Georgia comes from points beyond the Mississippi and Ohio River, and is affected by the threatened advance.

Trans. page 120.

Order Granting Injunction.

On August 3rd, complaint was made to the Interstate Commerce Commission; and on the same day the Court entered the following interlocutory decree:

"The above entitled cause came on to be heard on July 29th, 1908, on the rule issued against the defendants to show cause why an injunction pendente lite should not be granted.

"Defendants, and each of them, appeared specially and objected to the jurisdiction of the Court over the persons of the defendants; and the Court being of the opinion that the Court did have jurisdiction over the persons of the defendants in this cause, and so announcing, thereupon the defendants, and each of them, filed a joint and several demurrer and presented the same as cause in law why the relief prayed should not be granted:

"Thereupon proof was submitted in behalf of

complainants in support of the averments of their bill, and the cause was argued by counsel for the respective parties:

"At the conclusion of the hearing on July 30th, 1908, the Court took the matter under advisement until August 1st, 1908, when the opinion of the Court was handed down, sustaining the contention of the complainants and directing an issuance of the injunction prayed for upon the condition that complainants should within ten days present their complaint to the Interstate Commerce Commission for investigation and determination of the reasonableness of the rates involved:

"And it appearing that complainants together with other persons in the cities of Atlanta, Columbus, Rome and Athens, Georgia, have this day filed with the Interstate Commerce Commission their complaint praying the Commission to investigate and determine the reasonableness of the rates involved, and also to declare what are just and reasonable maximum rates:

"The Court being now fully advised in the premises, it is thereupon considered, ordered and decreed as follows, to wit:

"That the defendants, the Atlantic Coast Line Railroad Company; the Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; Southern Railway Company and Cincinnati, New Orleans and Texas Pacific Railway Company, and each of them, be and they are hereby, jointly and severally enjoined from enforcing collection of the advance in rates made effective August 1st, 1908, from Ohio and Mississippi River crossings, Nashville, Tennessee, and points with relation thereto, to all points within the State of Georgia, on

Classes B, C, D, and F, fresh meats C. L., grain and grain products, hay and packing house products; this injunction to continue and remain in force pending an investigation and determination of the reasonableness of the rates involved, by the Interstate Commerce Commission, or until further order of the Court."

Trans. page 131.

From this interlocutory decree the defendants (appellees) prosecuted an appeal to the Circuit Court of Appeals and obtained a supersedeas. (Trans. p. 132, etc.) On motion to vacate the order of supersedeas (Trans. p. 147) the Circuit Court of Appeals required the then appellants to enter into a bond in the sum of $100,000, conditioned to answer to the then appellees, and all parties interested who may intervene in the cause, for all loss and damage they may sustain by reason of the increase in rates in question, if the said appellants should fail to make good their appeal. (Trans. p. 165.) The bond required was accordingly filed.

Trans. page 166.

Opinion and Order of Circuit Court of Appeals.

The Circuit Court of Appeals reversed the judgment and decree of the Court below, Judges McCormick and Pardee concurring, and Judge Shelby dissenting. In the majority opinion it was held that the case was ruled by Texas & Pacific Railway Company vs. Abilene Cotton Oil Co., 204 U. S. 426, to the point that the Act to Regulate Commerce deprived a court of equity of its jurisdiction to enjoin an unjust and unreasonable advance in rates, previous to any action thereon by the Interstate Commerce Commission. (Trans. p. 170, etc.) It was also held that the case presented for necessary consideration the proper construction of the Act to Regulate Commerce, and therefore the jurisdiction of the Court did not rest solely upon the diversity of the citizenship of

the parties. In conclusion the Court said "that the sound construction of the different provisions of the Act to Regulate Commerce as amended and now in force necessarily forbids the exercise of the jurisdiction attempted to be invoked by the bill in this case. It follows that the decree appealed from must be reversed, and the cause remanded to the Circuit Court with instructions to dismiss the bill without prejudice."

Trans. page 182.

Judge Pardee's concurring opinion is such a condensed and succinct statement of the grounds of the decision of the majority that we venture to quote it in full:

> "I fully concur in the opinion prepared by Judge McCormick and the conclusion reached thereunder, because—
>
> 1st. I doubt if the lower court had jurisdiction **ratione personae.**
>
> 2nd. The complainants have other full and adequate remedies through the Interstate Commerce Commission.
>
> 3rd. The effect of an injunction in this case would be to throw the interstate rates of the whole Southeastern territory into disorder and confusion, resulting in greater evils than those suggested and alleged in the present bill.
>
> 4th. The initial regulation of interstate rates is placed by law in the hands of the Interstate Commerce Commission, and the courts should not interfere to restrain, compel or regulate, except when invoked after final action by the Commission and in accordance with the rules prescribed in the laws regulating interstate commerce.

It is not necessary to amplify these views further, that is done in Judge McCormick's lucid statement of the case."

Trans. page 183.

Judge Shelby dissented on the ground that a bill in equity to enjoin a wrong causing irreparable injury, is a remedy at common law and is saved by Section 22 of the Act to Regulate Commerce, which provides that "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." He further said that the remedy sought in this case was in harmony with the purpose of the Act to Regulate Commerce, in that the jurisdiction invoked might be exercised without in any way invading the domain of the Interstate Commerce Commission.

Trans. pages 183, 184.

From this order and decree of the Circuit Court of Appeals an appeal was duly prosecuted to this court (Trans. pp. 134-137), and a supersedeas obtained by giving the statutory bond (Trans. p. 192). A motion was made to advance the case in this Court, upon the ground of the great public importance of the questions involved. The Interstate Commerce Commission joined in this motion; and the hearing was accordingly advanced.

ASSIGNMENT OF ERROR.

I.

That the said Circuit Court of Appeals erred in reversing the decree rendered in the above entitled cause on August 3rd, 1908, by the Circuit Court of the United States for the Southern District of Georgia, wherein and whereby the said Circuit Court assumed jurisdiction over the persons and subject mat-

ter of the cause, and granted an injunction against the advance in rates complained of, pending an investigation and determination of the reasonableness of such rates by the Interstate Commerce Commission.

II.

That said Circuit Court of Appeals erred in not affirming said decree rendered in said cause on August 3rd, 1908, by said Circuit Court of the United States for the Southern District of Georgia.

III.

That said Circuit Court of Appeals erred in remanding said above entitled cause to the said Circuit Court with instructions to dismiss the original bill filed therein, without prejudice.

IV.

That said Circuit Court of Appeals erred in remanding the said cause with instructions to dismiss the bill, for that it appeared on the record that the Circuit Court of the United States for the Southern District of Georgia had jurisdiction both over the subject matter and over the persons of the parties to the cause.

V.

That the said Circuit Court of Appeals erred in adjudging and decreeing that the jurisdiction of said Circuit Court did not rest only upon the fact of diversity of citizenship of the parties.

VI.

That the said Circuit Court of Appeals erred in failing to adjudge and decree that if the jurisdic-

tion did not rest only upon the fact of the diversity of citizenship, it was founded upon the federal question arising out of the Act to Regulate Commerce and its amendments; and that such jurisdiction, being exclusive in the federal courts, the defendants (appellees) were subject to be sued in the district where found.

VII.

That the said Circuit Court of Appeals erred in adjudging and decreeing that the Interstate Commerce Commissions was vested with exclusive jurisdiction over the subject matter of the suit and the cause of action therein set forth and presented.

VIII.

That the said Circuit Court of Appeals erred in adjudging and decreeing that Section 22 of the Act to Regulate Commerce, as amended, did not permit the filing and prosecution of a suit in equity to enjoin an unjust and unreasonable advance in freight rates, occasioning irreparable injury and involving a multiplicity of suits.

IX.

That the said Circuit Court of Appeals erred in failing to adjudge and decree that Section 22 of the Act to Regulate Commerce, as amended, expressly preserves the remedy by suit in equity to enjoin an unreasonable advance in rates such as would occasion irreparable injury, in accordance with the practice and jurisdiction of courts of equity existing at common law at the time of the adoption of the Act to Regulate Commerce.

X.

That the said Circuit Court of Appeals erred in

failing to adjudge and decree that the said Circuit Court had jurisdiction to enjoin the advance complained of, on the ground that said advance was the result of an unlawful conspiracy and combination in restraint of trade and commerce, occasioning special damage, irreparable in its nature, to the appellants.

XI.

That the said Circuit Court of Appeals erred in adjudging and decreeing that because an action at law in a State court for damages occasioned by the enforcement of unreasonable rates, which had been exacted in accordance with the schedule of rates as filed, is forbidden by the Interstate Commerce Act, for a stronger reason a suit in equity to prevent the filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates, is also forbidden by said Act.

XII.

That the said Circuit Court of Appeals erred in adjudging and decreeing that a sound construction of the different provisions of the Act to Regulate Commerce as amended and now in force, necessarily forbids the exercise by a court of equity of its jurisdiction to enjoin an unreasonable advance in rates or a change to unjust and unreasonable rates.

XIII.

That the said Circuit Court of Appeals erred in adjudging and in effect decreeing that appellants have full and adequate remedies for the wrong and injury complained of through the Interstate Commerce Commission; and that the Courts are without jurisdiction to grant equitable relief in such cases in advance of action by the Interstate Commerce Commission.

XIV.

That the said Circuit Court of Appeals erred in adjudging and in effect decreeing that the initial regulation of interstate rates is placed by law in the hands of the Interstate Commerce Commission, and the courts should not interfere to restrain, compel or regulate, except when invoked, after final action by the Commission, and in accordance with the rules prescribed by the laws regulating interstate commerce.

XV.

That the said Circuit Court of Appeals erred in failing to adjudge and decree that the special remedies provided by the Act to Regulate Commerce and its amendments are not exclusive of equitable remedies, for that the special remedies do not afford adequate relief for the injury resulting from an unreasonable advance in rates, or a change to unjust or unreasonable rates.

XVI.

That the said Circuit Court of Appeals erred in failing to adjudge and decree that shippers have a property right to transportation by common carriers at just and reasonable rates; and that to deny to shippers the equitable remedy, jurisdiction to grant which is inherent in courts of equity for the protection of such right, in effect deprives the shippers of their property without just compensation and without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

XVII.

That the Circuit Court of Appeals erred in failing to adjudge and decree that the judical power of the

United States, being by the Constitution vested in one Supreme Court and such inferior courts as Congress may from time to time establish, the Circuit Courts of the United States cannot be deprived of the exercise of this judicial power inherent in courts of the United States established by Congress in accordance with the Constitutional requirements.

XVIII.

That the said Circuit Court of Appeals erred in reversing the decree of the Circuit Court and remanding the cause with instructions to dismiss the bill, for that the citizen, having a property right to transportation at reasonable rates, is entitled to invoke the jurisdiction and process of a court of equity for the preservation and protection of that right, in accordance with the judical methods established by the wisdom of successive ages; and that to deny the citizen the right to invoke the exercise of the inherent jurisdiction of a court of equity, without conferring upon him the right to invoke such judicial relief in some other forum of competent jurisdiction, denies to him the right to have his controversy determinted in accordance with the requirements of due process of law, guaranteed to him by the Fifth Amendment to the Constitution of the United States.

BRIEF OF THE ARGUMENT.

I.

1. The exaction of unjust and unreasonable charges by common carriers was a tort at common law, for which an action in damages would lie.

Tex. & Pac. R. Co. v. Abilene, etc. Co. 204 U. S. 426.

Int. Com. Com. v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479.

Chicago & N. W. R. Co. v. Osborne, 52 Fed. 912.

2. Prior to the adoption of the Act to Regulate Commerce, railway traffic in this country was regulated by the principles of the common law. Since that Act, it is governed by those principles as modified by the legislation of Congress.

Int. Com. Com'n. v. Baltimore & O. R. Co., 145 U. S. 263, 275.

Murray v. Chicago, etc. R. Co. 62 Fed. 24, 42.

Western U. T. Co. v. Call Pub. Co. 181 U. S. 92,102.

Atchison, etc. R. Co. v. Denver, etc. R. Co., 110 U. S. 667.

Kansas v. Colorado, 206 U. S. 46.

3. Sections 1 and 2 of the Interstate Commerce Act expressly adopt into the federal law the common law principles prohibiting unjust and unreasonable rates; and all such charges are "declared to be unlawful."

Int. Com. Com'n. v. Cincinnati N. O. & T. P. R. Co., 167 U. S. 479.

Tift v. Southern Railway Co., 123 Fed. 792.

4. Thomp. Corp. Section 5547.

4. The Court having power at common law to afford redress in damages after the wrong had been committed, equity is competent to protect the right by preventing the infliction of the injury, if the legal remedy is inadequate. "Equity will not suffer a right to be without a remedy."

4 Halsbury's Laws of England, § 115, p. 70.

Davis & Sons v. Taff Dale R. Co., App. Cas. (1895) 542.

Herron v. Rathmines, App. Cas. (1892) 498.

5. The Federal Courts of equity are vested under the Constitution with all of the inherent rights and powers of the High Court of Chancery of England;

and since the organization of the government have observed the usages and practice obtaining in that Court, which may be said to be "the common law of chancery."

Payne v. Hook, 7 Wall. 430.
Pennsylvania v. Wheeling Bridge Co. 13 How. 563.
Murray v. Chicago, etc. R. Co. 62 Fed. 24, 28.
Fenn v. Holme, 21 How. 484.
Thompson v. Railroad Co. 6 Wall. 137.

6. Under the principles of the common law, as applied by courts of equity in this country, preliminary injunctions have frequently issued to protect the rights of shippers and enforce the common law obligations of common carriers.

Taft, J. in Toledo, etc., R. Co. v. Penna. Co. 54 Fed. 730, 742.
Coe v. Louisville & N. R. Co. 3 Fed. 775.
Menacho v. Ward, 27 Fed. 529.
Scofield v. Lake Shore R. Co., 43 Ohio St. 571.
Rogers Loc. Wks. v. Erie, etc. R. Co. 20. N. J. Eq. 379.

In the Express cases (8 Fed. 799; 10 Fed. 210) injunctions were granted by the Circuit Court. This Court, in reversing those cases, denied the right of the express company to the service demanded, but did not question the remedy, had the right existed.

Express Cases, 117 U. S. 1.

In the Toledo cases, 54 Fed. 730; Ib. 746, Circuit Judge Taft and District Judge Ricks granted mandatory injunctions to enforce the common law duties of the carriers, and to protect commerce against unlawful interference, without previous action by the Interstate Commerce Commission. The principle in those cases was affirmed by this Court in Ex parte Lennon, 166 U. S. 548

In the case of Interstate Stock Yards v. Indianapolis U.Ry.Co.,99 Fed.472, the Circuit Court granted an injunction against undue discrimination on the part of a common carrier, thereby enforcing the common law duty declared in Section 3 of the Interstate Commerce Act. The Court held that previous action by the Commission was not necessary, and that the remedy at law being inadequate equity would take jurisdiction. This case was referred to with approval by this Court in Central Stock Yards v. Louisville & N. R. Co. 192 U. S. 568.

It is true that these were cases of unjust discrimination; but we assume that the Court is equally competent to protect the right to just and reasonable rates declared in Sections 1 and 2 of the Act.

7. The jurisdiction in equity rests safely upon the grounds of the irreparable nature of the injury, the inadequacy of the legal remedy, and the avoidance of a multiplicity of suits. These grounds of jurisdiction appear in cases when unjust, unreasonable and unlawful freight rates are about to be exacted.

United States v. Union Pac. R. Co. 160 U. S. 1.
Watson v. Sutherland, 5 Wall, 74.
Oelrichs v. Spain, 15 Wall, 211, 228.
United States v. Michigan Cent. R. Co., 122 Fed. 544.
Jewett Bros. v. Chicago, etc. R. Co., 156 Fed. 160.
Tift v. Southern R. Co. 123 Fed. 789, 794-5.
Interstate Stock Yards v. Indianapolis Un. Ry. Co., 99 Fed. 472, 483; Cited with approval in Central Stock Yards v. L. & N. R. Co. 192 U. S. 568.

It follows that the federal circuit courts, in the exercise of their inherent equitable jurisdiction, have the right and power to provisionally enjoin an un-

just and unreasonable advance in freight rates, about to be exacted, unless that jurisdiction has been taken away from them by competent legislative action.

II.

1. The Act to Regulate Commerce does not in terms deprive the circuit courts of their jurisdiction to enjoin unreasonable advances in rates. The statute will not be construed as taking away this pre-existing right, unless it be found that the right is so repugnant to the statute that the survival of the right would in effect deprive the statute of its efficacy.

Texas & P. R. Co. v. Abilene, etc. R. Co. 204 U. S. 426, 336-7.

2. Section 22 of the Act expressly preserves remedies then existing "at common law or by statute." An injunction against the commission of a wrong that would occasion irreparable injury is a remedy "at common law", in the sense that it existed in England, independent of statute, long before the foundation of our government, and was adopted in this country as part of "the common law of chancery". The words "common law" were used in the act in contra-distinction to "statute law"; together they were intended to include all existing judical remedies, both legal and equitable.

2. Words & Phrases Judically Defined, 1329.

Dissenting opinion of Shelby, J. in the instant case, Trans P. 183-4; 166 Fed. 219.

The equitable remedy, therefore, remains available, unless the right has been withdrawn by implication.

3. The lower courts have variously construed the meaning and effect of the Abilene case, (204 U. S.

426) taken in connection with the later case of Southern Railway Co. v. Tift, 206 U. S. 428, decided at the same term.

That the right of injunction remained unimpaired in the circuit courts, and that the reasoning of the Abilene case is not controlling on this point, was held in the following cases:

Northern Pac. R. Co. v. Pacific Coast Lumber Mgrs. Asso. (C. C. A.) 165 Fed. 1.

Union Pac. R. Co. v. Oregon, etc. Assn. 165 Fed. 13.

Kiser v. Central of Ga. Ry. Co. 158 Fed. 193.

Jewett Bros. v. Chicago, etc. R. Co., 156 Fed. 160.

The same conclusion was reached by Judge Hunt, in the case of Kalispell Lumber Co. v. Great Northern Ry Co. 157 Fed. 845, 848; by Judge Speer, in the instant case (Trans. p. 123; 163 Fed. 738); and by Circuit Judge Shelby, in his dissenting opinion in this case. (Trans. p. 183-4; 166 Fed. 219). In the case of Potlach Lumber Co. v. Spokane, etc. R. Co., 157 Fed. 588, Judge Whitson denied the injunction only because the rate had already gone into effect, and no preventive relief could be granted. The Circuit Court of Appeals for the Ninth Circuit made a like ruling in reversing the Kalispell case, 165 Fed. 25.

The Circuit Court of Appeals for the Fifth Circuit, in the instant case, construed the Abilene case as depriving the Court of this equitable jurisdiction. Trans. page 179; 166 Fed. 217-18.

4. The weighty reasons assigned in the Abilene case against the maintenance of an action at law for damages without previous action by the Commission, do not apply to a suit in equity to enjoin the com-

mission of a threatened wrong, until the Interstate Commerce Commission can pass upon the question of reasonableness and prescribe rates to be charged in the future. Because an action at law is forbidden, the Court is not required to say that the remedy in equity has also been denied.

Tift v. Southern Ry. Co., 206 U. S. 428.

5. The effect of the decision in the Abilene case is merely to postpone the judicial remedy. A denial of the remedy in equity would utterly destroy the right itself, and would leave the shipper remediless, for that the Commission has no judicial power and could grant no appropriate relief.

Northern Pac. R. Co. v. Pacific Coast L. M. Assn., 165 Fed. 1, 8.

Tift v. Southern Railway Co., 123 Fed. 789, 794.

Interstate Com. Com'n. v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 612.

It is not to be implied that Congress intended to deprive the citizen of this right, and the court of this power, without vesting in some other judicial tribunal the power of affording adequate relief.

6. The special remedies provided in the act were not intended to be exclusive of other appropriate judicial remedies; otherwise the language of Section 22 would be idle and unmeaning.

Texas & P. R. R. Co. v. Abilene, etc. Co. 204 U. S. 426, 446-7.

United States v. Union Pac. R. Co. 160 U. S. 1.

Toledo, etc. R. Co. v. Penna. Co. 54 Fed. 730.

Tift v. Southern Ry. Co. 123 Fed. 789, 792.

Little Rock, etc., R. Co. v. East Tenn. V. & G. R. Co., 47 Fed. 771, 773-4.

In the case at bar the demurrer admitted and the Circuit Court found that the rates about to be enforced were prima facie unjust, unreasonable and unlawful. The Court suspended the enforcement of the rates, and referred the question of reasonableness to be passed upon in the first instance by the Interstate Commerce Commission. Only in this way can the rights arising out of the Interstate Commission Act be protected and enforced by the appropriate tribunals, acting in harmony with each other. The Court exerts the judical power for the purpose of preventing irreparable injury and avoiding a multiplicity of suits; the Commmission exercises the quasi-legislative function of declaring what is reasonable in the matter of rates to be charged in the future.

III.

1. Section 1 of Article III of the Constitution is mandatory and requires that the whole judicial power of the United States shall be vested in the courts.

Martin v. Hunter, 1 Wheat. 328.
Ableman v. Booth, 21 How. 521.

The whole judicial power in civil cases has been vested in the Circuit Court by appropriate legislation of Congress.

Louisiana State Lottery Co. v. Fitzpatrick, 3 Woods 222; 15 Fed. Cas. No. 8541.

2. While Congress may distribute the judicial power of the United States, it cannot vest any portion of that power in tribunals other than such inferior courts as it may establish under the Constitution. The Interstate Commerce Commission is not, and under the Constitution, could not be vested with judicial power.

Martin v. Hunter, 1 Wheat. 330.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 612, 613.
Interstate Commerce Commission v. Cinnati, etc. R. Co., 76 Fed. 183.
State v. Sullivan, 50 Fed. 599.

Congress can neither withdraw from judicial cognizance any matter which in its nature is the subject of a suit at common law or in equity; nor can it bring under the judicial power a matter which from its nature is not a subject for judicial determination.

Murray v. Hoboken Land Co., 18 How. 272.
Interstate Commerce Commission v. Brimson, 154 U. S. 447, 475.

The entire judicial power of the nation is granted to the courts by Section 1 of Article III of the Constitution; and Congress is without power to impose any limitation upon the exercise of this judicial power, not found in the Constitution itself.

Kansas v. Colorado, 206 U. S. 46, 82-83.

A bill seeking to enjoin an unjust and unreasonable advance in rates presents a case in equity to which the judicial power extends.

Osborne v. Bank of United States, 9 Wheat. 738, 819, 225.
Smith v. Adams, 130 U. S. 167.

IV.

1. The reasonableness of a rate charged by a common carrier is eminently a question for judicial investigation, requiring due process of law for its determination.

Chicago, etc. R. Co. v. Minnesota, 134 U.S. 418, 458.
Reagan v. Farmers L. & T. Co. 154 U. U. S. 398.

Covington, etc. Turnpike Co. v. Sandford, 164 U. S. 578, 592-3.
Cincinnati, etc. R. Co., v. Interstate Com. Com'n. 167 U. S. 479.
Smyth v. Ames, 169 U. S. 466, 523.
Chesapeake, etc. Tel. Co. v. Manning, 186 U. S. 244.

Rates that have been prescribed according to the requirements of the Interstate Commerce Act, although not actually in effect, become subject to judicial inquiry.

Madison v. Madison Gas. Co., 8. L. R. A. New Series, 529, 536.

Inquiry into such rates falls within the definition of the judicial power given in Prentis v. Atlantic Coast Line R. Company, 211 U. S. 210. Where rates have been prescribed by a State, or under its authority, although such rates have not been put into effect, they become subject to judicial inquiry in the Federal Courts.

Stone v. Farmers L. & T. Co. 116 U. S. 307.
Reagan v. Farmers L. & T. Coo. 154 U. S. 362.
Symth v. Ames, 169 U. S. 466.

2. To deprive the shipper of the right to invoke protection against a change to excessive and unlawful rates according to the judicial methods established by the wisdom of successive ages, would be in effect to deprive him of his property without due process of law. The right to transportation at just and reasonable rates is a right of property.

Smyth v. Ames, 169 U. S. 466.
U. S. v. Michigan Cent. R. Co., 122 Fed. 545.

Railways in this country perform a governmental

function, and in the nature of the case are practical monopolies.

Texas & Pac. R. Co. v. Interstate Commerce Com'., 162 U. S. 197.

When property is devoted to a public use, the public acquires an interest in that use.

Munn v. Illinois, 94 U. S. 113.

It follows that if Congress has withdrawn from the Circuit Courts the exercise of the judicial power to enjoin a destructive advance in rates without conferring it upon some other "inferior court", the shipper has been deprived of his property without compensation, and without due process of law.

V.

Where a rate voluntarily established by the carriers has long been in force, and an important traffic has moved under it, the rate is presumed to be reasonable and the carrier, when properly called upon, must justify the advance.

Interstate Commerce Com'n. v. Chicago G. W. R. Co., 209 U. S. 108, 120.

This presumption is one of fact, which has frequently been applied by the Interstate Commerce Commission and the courts.

Tift v. Southern Ry. Co. 10 I. C. C. R. 548.

Yellow Pine Association v. Illinois Cen. R. Co., 10 I. C. C. R. 535.

Pacific Coast L. M. Asso., v. Northern Pac. R. Co., 14 I. C. C. R. 23.

Holmes v. Southern R. Co., 3 I. C. C. R. 460.

Page v. Del. L. & W. R. Co., 4 I. C. C. R. 535.

17 Am. & Eng. Enc. 133.

Interstate Com. Com'n. v. East Tenn. V. & G. R. Co., 85 Fed. 107.

See also:
Cotting v. Stock Yards Co., 183 U. S. 97.

Under the English Railway and Canal Traffic Act, it lies upon the carrier to show that any increase in the rate or charge is reasonable.

4 Halsbury's Laws of England, §§147, 148; p. 89.

In the case at bar the carriers did not attempt to justify or explain the advance, but by their demurrer admitted the truth of the allegations of the bill and the proof submitted. The threatened advance was therefore prima facie so unjust and unreasonable as to authorize and require the provisional injunction granted.

Kelley v. Jackson, 6 Peters 631.

VI.

1. While only the government can maintain a suit for a general injunction against an unlawful combination in restraint of trade, private persons may invoke the aid of the court for preventive relief against specific acts resulting from the unlawful conspiracy which will occasion irreparable injury to the complainants.

Steamship Co. v. McGregor, 23 Q. B. Div. 598, 624.
Toledo, etc. R. Co. v. Penn. Co. 54 Fed. 730.
Buffalo Lubricating Oil Co. v. Standard Oil Co., 106 N. Y. 669.
Steamship Co. v. McKenna, 30 Fed. 48.
Carew v. Rutherford, 106 Mass. 1.
Bowen v. Hall, 6 Q. B. Div. 333, 337.
Springhead Spinning Co. v. Riley, 37 L. J. Chan. 889; L. R. Eq. 551.
Bement & Son v. National Harrow Co. 186 U. S. 70.
5 Pomeroy Eq. 478.

2. Although the Sherman Anti-Trust Act did not give a new right to bring suit in equity, the court having acquired jurisdiction on other grounds, may enjoin unlawful acts of a conspiracy occasioning special damage to the complainant.

Blindell v. Hagan, 54 Fed. 40, affirmed 56 Fed. 696.

Gulf, etc. Co. v. Miami Steamship. Co. 86 Fed. 407.

Bigelow v. Calumet & Hecza Mining Co., 155 Fed. 869.

In re Debs 158 U. S. 564.

3. The provisions of the Anti-Trust Act apply to railroads, and render illegal all agreements made by them which are in restraint of trade and commerce.

U. S. v. Trans-Missouri Freight Asso., 166 U. S. 290.

U. S. v. Joint Traffic Ass'n., 171 U. S. 505.

U. S. v. Northern Securities Co. 193 U. S. 197.

4. This case is distinguished from Minnesota v. Northern Securities Co. 194 U. S. 48, for that in the Minnesota case no direct injury was shown, and a general injunction was sought such as would in effect require the dissolution of the combination; while in the case at bar special damage is shown, and an injunction is sought only against specific unlawful acts resulting from the combination.

VII.

1. If the jurisdiction of the court is founded upon a right arising out of the Act to Regulate Commerce, it is exclusive.

Van Patten v. Chicago, etc. R. Co., 74 Fed. 981.

In re Hohorst, 150 U. S. 653.

U. S. v. Mooney, 116 U. S. 106.
Atkins v. Disintegrating Co., 18 Wall. 272.
In re Louisville Underwriters, 134 U. S. 488, 493.
U. S. v. Standard Oil Co., 152 Fed. 290.
Northern Pac. R. Co. v. Pacific Coast L. M. Asso., 165 Fed. 1.

2. Unless the cause of action is one over which state courts have concurrent jurisdiction, the judiciary Act of 1887 and 1888 does not apply, and the defendants may be sued wherever found.

Martin v. Hunter, 1 Wheat. 304.
Federalist, eighty-second number.
Van Patten v. Chicago, etc. R. Co., 174 Fed. 781.
Northern Pacific R. Co., v. Pacific Coast L. M. Ass'n., 165 Fed. 1.

3. The cases of Galveston, etc. R. Co., v. Gonzales, 151 U. S. 496; In re Keasby & Mattison, 160 U. S. 221; Shaw v. Mining Co., 145 U. S. 444; Southern Pacific R. Co. v. Denton, 146 U. S. 202, are none of them in point. In each of these cases the cause of action was one over which the state courts had concurrent jurisdiction; and they are all directed to the point that a corporation is, within the meaning of the Judiciary Act, an inhabitant only of the district and State of its corporation.

Northern Pacific R. Co. v. Pacific Coast L. M. Ass'n., 165 Fed. 1- 10, 11.

ARGUMENT.

FIRST.

A Court of Equity, in the Exercise of Its Inherent Jurisdiction, May Enjoin an Unjust and Unreasonable Advance in Freight Rates by Common Carriers, in Order to Prevent Irreparable Injury, and Avoid a Multiplicity of Suits.

1. The facts pleaded and shown in this case are ample to sustain the finding of the trial court that the rates prescribed in the advance about to be made effective were so prima facie unreasonable and unjust, as to require their suspension pending an investigation by the Interstate Commerce Commission.

Former Rates Reasonably High and Compensatory

The rates in force in the year 1904 were regarded by the shippers as excessive and unjust. Their continued complaints in this regard led to a conference between a committee of citizens, representing the interests of the shippers and the public, and the traffic officials of the railway lines initial at Atlanta, for the purpose of considering a readjustment of freight rates both from the east and from the west to Atlanta and related points. (Trans. page 5.) The Traffic Manager of the Southern Railway Company (Mr. Culp), and of the Nashville, Chattanooga and St. Louis Railway (Mr. H. F. Smith), took an active part in the proceedings of this conference. (Trans. page 53.) Conferences were held at the Piedmont Hotel, in the City of Atlanta, on November 15th and 15th, 1904, when an adjournment was had in order that the traffic officials of the railway lines might consult with the executive officials of their respective companies and with representatives of connecting lines, whose interests were also affected. (Trans. page 38.) The conference reassembled on December

16th, 1904. It was reported to the conference that a meeting had been held in New York of the executive and traffic officials of the southern lines, east of the Mississippi River (which includes all of the territory affected by the rates complained of), at which meeting these officials went very thoroughly and patiently into many of the details. Concerning this meeting Mr. Winburn (Vice-President and Traffic Manager of the Central of Georgia Railway), said:

> "I don't know when the presidents of these railroads have gotten together and devoted as much time to any one subject as they did to the subject of the Atlanta situation, and the rates that bear upon this situation."
>
> Trans. page 78.

Mr. H. F. Smith (Vice-President and Traffic Manager of the Nashville, Chattanooga & St. Louis Railway), declared:

> "I want to say it was the most representative meeting of the higher officials of the several railroads that I had witnessed in ten years. They had to come from New Orleans, Mobile, St. Louis, and all over the country; but we had a representative meeting."
>
> Trans. page 40.

The result of the New York conference was a proposition to reduce the class rates in varying proportion, the uniform reduction on meat, grain and flour to be two cents a hundred pounds. (Trans. page 39.) Representatives of the lines interested in the Atlanta rates had reached a compromise with those not having a direct interest in the rates. The figures submitted to the Atlanta committee were considered by those other interests—those representing other communities—and were concurred in by them.

Trans. page 39 (H. F. Smith).

The proposition of the traffic officials was accepted by the citizens' committee; and as a direct result

thereof the rates from Ohio and Mississippi river crossings to Atlanta and related points (including Macon, Augusta, Columbus, Albany, etc.), were reduced, on the classes and commodities as shown in paragraph V of the original bill.

Trans. page 5.

Rarely has a rate adjustment been arrived at with such deliberate, thorough and careful consideration. The lines immediately concerned, as well as those less directly affected, and the shippers represented by the citizens' committee, all concurred in the result attained; and the rights and interests of other communities were also considered and regarded.

Reductions in rates arrived at with all this precaution and after such full consideration, may in all fairness be said to be a declaration—if not indeed an agreement—that the resultant rates were just, reasonable and compensatory. The carrier who would advance such rates should be required, both in law and morals, to give some convincing reason therefor.

The reduced rates were made effective February 1st, 1905, and were continuously maintained until notice was given on June 27th, 1908, that the advance in question would be made effective on August 1st, 1908. Under these rates thus voluntarily established, a large and important traffic moved; business and trade relations became adjusted thereto; the rates were satisfactory to the shippers and remunerative to the carriers; and under them the carriers, the dealers and the public all prospered, until the advent of the abnormal conditions which followed the financial panic in 1907. (Trans. pages 5, 7.) For some months following the panic the volume of railway traffic greatly declined; but this was not due to any special loss on the particular traffic affected by the advance, the decline in other traffic being much greater than in those commodities; nor did the car-

riers suffer more from the result of the panic than did the dealers and the public. (Trans. page 9.) If the carriers were justified in making any advance at all, it should have been equitably distributed, and these articles of daily use and necessity should not have been singled out to bear the burden.

The Advance Was Not Justified.

While there is no presumption of wrong arising from a change of rates by a carrier, undoubtedly when rates are advanced the carrier making the change must, when properly called upon, be able to give a good reason therefor.

Interstate Com. Com. v. Chicago G. W. R. Co., 209 U. S. 108, 120.

Where a rate voluntarily established by the carriers has long been in force, and an important traffic has moved under it, the rate is presumed to be reasonable, and the carrier when properly called upon must justify the advance; particularly is this true when the carrier and the shipper have prospered under the rate, and the public interest has been thereby subserved. This is not a presumption of law, but an inference of fact which has frequently been applied by the Interstate Commerce Commission and the courts. The presumption will always be that the compensation charged for the service or thing is sufficient to be reasonable.

Tift v. Southern Ry. Co., 10 I. C .C. R. 548.
Yellow Pine Asso. v. Illinois C. R. Co., 10 I. C. C. R. 535.
Pacific Coast Lumber Mfgrs.' Asso. v. Northern Pac. R. Co., 14 I. C. C. R. 23.
Holmes v. Southern Ry Co., 3 I. C. C. R. 460.
Page v. Del. L. & W. R. Co., 4 I. C. C. R. 533.

17 Am. & Eng. Enc. 133.
Interstate Com. Com. v. E. Tenn. V. & G. R. Co., 85 Fed. 107.

"Long usage and acquiescence in one uniform payment of toll is undoubtedly cogent evidence that it is reasonable."

Gunning on Law of Tolls, quoted in Cotting v. Stock Yards Co., 183 U. S. 79.

Under the English Railway and Traffic Act, it lies upon the company increasing any rate or charge to show that the increase is reasonable; and for that prupose it is not sufficient to show that the rate and charge is less than the maximum authorized by parliament.

4 Halsbury's Laws of England, page 89, Sections 147-148.

Rates so made and maintained are cogent evidence of the fact that such rates are reasonably high and compensatory; and a sharp advance in such rates without justification or explanation must be deemed to be prima facie unreasonable and unjust. "Prima facie evidence of a fact is such as in judgment of law is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose."

Kelly v. Jackson, 6 Peters 631.

The advance was not a compensatory charge to fairly meet the cost and value of the service to be performed by the carriers, but was an arbitrary and unlawful exaction. The rates that had been in force for a series of years were reasonably high and compensatory, under normal conditions. (Trans. pages 8-9.) The inspiration of the advance was a desire for greater revenue, and it was sought to take advantage of an abnormal condition, temporary and transitory in its nature, to levy a permanent bur-

den upon commodities of great general utility and necessity.

Trans. page 9.

Carriers have no right to advance rates in times of general adversity in order to compensate for a loss of tonnage. They share in the prosperity of the country by an increase in traffic; in times of business depression they must expect a diminution of tonnage, and are required to submit to the temporary loss resulting from the general financial and commercial distress. If it were otherwise the railway companies would compose a preferred class, which, because of its power to levy a tax upon the commerce and industry of the country, would be enabled to escape any share in the loss which its patrons and the public must suffer. If this be their right, then indeed is all other property held at the mercy of the railroads.

At the time the advance was announced there were unmistakable signs of the return of prosperity and the restoration of normal conditions. The net earnings of the railways were increasing; in some instances showing an increase over the corresponding months of the preceding year. Thus the net earnings of the Southern Railway for the months of March, April and May, 1908, showed an increase of $663,000 over the corresponding months for 1907. (Trans. page 118.) For the six months ended May, 1908 (which included the months during which the effects of the panic were most severely felt), the Western & Atlantic Railroad, the Georgia line of the Nashville, Chattanooga and St. Louis Railway, showed an increase in net earnings over the corresponding period for the preceding year, and within less than $2,000 of the net earnings for the six months ended May, 1906, which was perhaps the period of greatest prosperity ever enjoyed by the railroads in this country.

Trans. page 120.

The promise of the return of prosperity has not been disappointed. It is a matter of common knowledge, of which the court may take judicial notice, that the freight tonnage is increasing so rapidly that the carriers will be shortly taxed to their capacity to transport it.

Injunction the Recognized Remedy At Common Law.

2. Common carriers were prohibited at common law from imposing unjust and unreasonable charges. Interstate Com. Com'n. v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479. The exaction of such charges constituted a tort for which an action would lie. Texas & Pac. R. Co. v. Abilene, etc., Oil Co., 204 U. S. 426. "A reasonable compensation was all that they could exact, and he who felt aggrieved by a charge could always invoke the aid of the courts to protect himself against it." Chicago, etc., R. Co. v. Osborne, 52 Fed. 912.

The right to afford redress for a wrong when committed implies the power to prevent the wrong when threatened. Injunctions against common carriers to prevent the exaction of threatened excessive charges was a right recognized at common law.

"If a railway company exacts an excessive charge, the excess can be recovered by action; and if such charge is only threatened, an injunction can be obtained to restrain it. Hence the ordinary courts should deal with these questions, and the Commissioners have no jurisdiction."

4 Halsbury's Laws of England, Section 115, p. 70.

See also, Davis & Sons v. Taff Dale Co., App. Cas. (1895) 542.

Herron v. Rathmines, etc., App. Cas. (1892) 498.

Common law principles were applicable to railway

traffic in this country prior to the legislation of Congress on the subject.

> "Prior to the enactment of the Act of February 4th, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, railway traffic in this country was regulated by the principles of the common law applicable to common carriers."
>
> Int. Com. Com'n. v. B. & O. R. Co., 145 U. S. 263, 275.

> "In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action; and therefore in the present case all shipments made before the adoption of the Interstate Commerce Act are governed by the common law, and those made since the adoption of that act, by the common law as modified by that Act."
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> Murray v. Chicago, etc., R. Co., 62 Fed. 24, 42.
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> West. Un. Tel. Co. v. Call. Pub. Co., 181 U. S. 92, 102.
>
> Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U. S. 667.

The federal courts of equity have all of the inherent jurisdiction possessed by the English High Court of Chancery.

> Payne v. Hook, 7 Wall. 430.

The practice and usages of the High Court of Chancery in England, in the exercise of its jurisdiction, may be said to be the common law of chancery; and, since the organization of the government, have been observed in our federal courts of equity.

> Penna. v. Wheeling Bridge Co., 13 How. 518, 563.

"For after all, the common law is but the accumulated expressions of the various judicial tribunals in their effort to ascertain what is right and just between individuals in respect to private disputes."

Kansas v. Colorado, 206 U. S. 46.

"It is certainly not necessary to cite authorities in support of the proposition that the Constitution of the United States neither created nor enacted a system of equitable jurisprudence and procedure, but recognizing the existence of the system, it conferred upon the courts of the United States jurisdiction in equity, maintaining the pre-existing distinction between equitable and legal remedies."

Murray v. Chicago, etc., R. Co., 62 Fed. 24, 28.

"And in analagous cases, where it has been sought to enforce the common law obligation of a common carrier, the preliminary mandatory injunction has frequently issued."

Toledo, etc., Co. v. Penna. Co., 54 Fed. 730, 742.
Coe v. Louisville & N. R. Co., 3 Fed. 775.
Menacho v. Ward, 27 Fed. 529.
Scofield v. Lake Shore R. Co., 43 Ohio St. 571.
Rogers Loc. Wks. v. Erie, etc., R. Co., 20 N. J. Eq. 379.
High on Inj., Sections 616, 621.

The Irreparable Nature of the Injury.

The exaction of unjust, unreasonable and unlawful charges by common carriers, constitutes a constantly recurring grievance, incapable of pecuniary estimation, and therefore irreparable.

The bill alleges, and the demurrer admits, that dealers and consumers in the Southeast are largely dependent upon the producing territory reached through Nashville and the Ohio and Mississippi

River crossings for their supply of the commodities subjected to the advance; that the advance will seriously disturb existing trade relations, causing loss to the dealers and injury to the consuming public; that the commodities are sold upon such a narrow margin of profit that the dealer can not absorb the whole advance, but must shrink his already small profit to cover part of the advance and charge the remainder to the consumer by an increase in the price; that the increase in rates will inevitably restrict the traffic, reduce the business of the complainants and other dealers, and deprive the consuming public, of some part thereof, of the ability to purchase and use these commodities to that extent to which they are entitled; all of which is to the irreparable injury of the complainants and others of their class, and to the prejudice of the public interest.

Trans. page 8; Original Bill, paragraph IX.

The Inadequacy of the Legal Remedy.

The inadequacy of the legal remedy is otherwise manifest. The only legal remedy would be by complaint, in the first instance, to the Interstate Commerce Commission, after the injury had been inflicted and its grievous consequences suffered. After months of delay (which seems unavoidable in this method of procedure), the aggrieved shipper may obtain a reparation order for the excess paid over what the Commission may find to be a just and reasonable rate. The order must then be sued on in the Circuit Court in a de novo proceeding, in which the finding of the Commission is only prima facie correct. An appeal may be then taken to the Circuit Court of Appeals and from thence to the Supreme Court. In the meantime the shipper has been forced to pay an excessive rate, and his business may have sustained serious injury, perhaps ruin. Few shippers can afford to undergo this long, expensive and

trying ordeal, merely to recover in the end the excess paid.

The Interstate Commerce Commission has itself pointed out the inadequacy of the remedy in the case of an unjust advance in rates. In the report of the Commission for 1908 it was said:

> "Railways may establish whatever interstate rates they choose. No proceeding can be begun before the Commission until the schedule establishing the rate has been filed. The order of the Commission, when made, can not take effect in less than thirty days. If the investigation is to be one in reality as well as in name, if all parties are to be fully heard, as they should be, several weeks, and usually several months must elapse before a conclusion resulting in an order can be reached. Meantime the rate established by the carrier remains in effect.
>
> "No carrier should be required to reduce rates without a fair hearing; neither, in our opinion, should the public be required to pay advanced rates without an opportunity for a fair hearing."

The Tift case is strongly in point. That litigation was begun in April, 1903, to restrain a threatened advance in rates on lumber. Complaint was filed with the Commission in June, and the report of the Commission was rendered eighteen months thereafter. Further litigation in the Courts ensued. The case went to the Circuit Court of Appeals and from thence to this Court, where it was decided in May, 1907. Litigation followed concerning reparation. Not a dollar was received by the aggrieved shippers until 1909, and even now the litigation has not been concluded. A multiplicity of suits resulted over the claims of buyer and seller, manufacturer and consumer. All of this loss and delay would have been avoided had the advance been enjoined in the first

instance. Referring to the Tift case, Judge Speer, who was also the trial Judge in that case, said:

> "There was a case where similar charges, arbitrary and unreasonable, it was alleged, were imposed upon the shippers. The decree was granted upon the fullest consideration. It was determined by all the courts having jurisdiction, and by the Interstate Commerce Commission that those rates were arbitrary and illegal. It was affirmed by the Supreme Court of the United States. The railroads, through their distinguished representatives, had in open Court promised to pay back to the shippers the amount thus exacted, in case this Court would withhold the injunction, and the case should finally be determined against them. And yet, now we see the shippers are driven to multitudinous proceedings in other cases, and delayed year after year until their substantial rights will apparently be frittered away by the cost of the litigation. This is a grave wrong to the shippers."
>
> Trans. page 109.

"It is not enough that there is a remedy at law. It must be plain and adequate, or in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

United States v. Union Pac. R. Co., 160 U. S. 1.
Watson v. Sutherland, 5 Wall. 74.
Oelrichs v. Spain, 15 Wall. 211, 228.

"The act of the railroad that affects the grain grower is not a single unlawful act; he is making shipments today, tomorrow, and next month. The policy of the roads, as shown in the bill, affects him in each of these shipments, and will affect him in all future shipments. His situation is analagous to that of one who is subjected to continuous trespass and who can not, on that account, in an action on a single trespass,

obtain ample redress. Nothing short of the prohibitive arm of a court of chancery can give to the grain growers and other producers affected by this policy of the railroads the free competitive field for the sale of their products to which they are entitled as a substantive right under the terms of the Interstate Commerce Act."

United States v. Mich. Cent. R. Co., 122 Fed. 544.

"In these days of fierce business competition a difference of a fraction of a cent in a freight rate may mean to the jobber or wholesaler success or failure in business. The damages which a shipper will suffer from an unjust or discriminatory freight rate is not the mere difference between a reasonable and just rate and an unreasonable and unjust rate. The putting in of an unjust rate or an unjustly discriminatory rate may, in addition to the damage caused by the payment of the rate itself, cause business ruin. Must the shipper, when notice is given that a carrier intends to put in effect an unjust rate or an unjustly discriminatory rate which the shipper knows will ruin his business, sit still and let the rate go into effect, and then complain to the Interstate Commerce Commission, which after three or four years may decide the rate to be reasonable or unreasonable? And, if the shipper is successful in his contention, he may then with business ruined, go into court to enforce the award of the Commission, and at the end of three or four years more collect his damages, not those arising from the ruination of his business, but merely the excess paid by him over and above a reasonable rate. There is no plain and adequate remedy in such a proceeding."

Jewett Bros. v. Chicago, etc., R. Co., 156 Fed. 160, 166-7.

"It is often in the power of a railroad company to greatly injure or wholly destroy one's business, or a

general business of a particular class. In such case injunction would be the appropriate remedy."

Tift v. Southern Ry. Co., 123 Fed. 789, 794.

"The nature of the wrong complained of, the fact that it is of a continuing character, that it is not susceptible of accurate pecuniary estimation, and that resort to actions at law would involve a multiplicity of suits, none of which would end the litigation, all tend to make it manifest that the remedy in a court of law is not as adequate to afford relief as is the remedy in a court of equity."

Interstate Stock Yards v. Indianapolis U. Ry. Co., 99 Fed. 472, 483.

This case was cited with approval by this Court in Central Stock Yards v. Louisville & N. R. Co., 192 U. S. 568, wherein it was said:

> "For the same purpose (of decision) we further assume that such rights as the plaintiff has may be enforced by bill in equity."

"It is equally clear that in this case the court has jurisdiction in order to avoid a multiplicity of suits. It would be a reflection upon American jurisprudence if such a multitude of complainants, who have identical claims of right relative to the same subject matter against a multitude of defendants, all of whom are public corporations who are alleged to be in a combination to inflict a common and simultaneous wrong on each and every complainant, should be driven to the cost and expense of maintaining separate actions at law for each instance of such alleged wrong."

Tift v. Southern Ry. Co., 123 Fed. 789, 795.

It seems clear, therefore, that the federal courts of equity in the exercise of their inherent jurisdiction are competent to grant appropriate relief in

cases such as the one now under consideration, unless the exercise of this power has been withdrawn by the Interstate Commerce Act.

SECOND.

The Act to Regulate Commerce Has Not Deprived the Federal Courts of Equity of Their Inherent Power to Enjoin an Unjust and Unreasonable Advance in Rates.

1. There is nothing in the language of the Interstate Commerce Act which in terms denies to the Circuit Courts the jurisdiction in question; if the exercise of this power has been withdrawn from the courts, that result has been accomplished by implication.

"In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

Texas & Pac. R. Co. v. Abilene, etc., Co., 204 U. S. 426, 436-7.

Section 22 of the Act expressly declares that "nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

Act Feb. 4, 1887, c. 104, 24 Stat. 387.

It has been shown that injunction in such cases

was a recognized remedy at common law, and that the practice was adopted in this country as a part of what Mr. Justice McLean, in the Wheeling Bridge case, 13 How, 563, called the "common law of chancery."

The question then, is whether the pre-existing right to enjoin an unjust and unlawful advance in interstate freight rates is saved by the provisions of Section 22; or whether the exercise of this right would be so absolutely inconsistent with the provisions of the Act as to destroy its purpose.

The single case relied upon by the Circuit Court of Appeals in support of its conclusion that the power to grant this relief had been taken away from the courts, is the case of Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426.

The weight of authority in the lower courts favors the proposition that the Abilene case construed in connection with the Tift case (206 U. S. 428) does not have the effect of denying to the courts the exercise of this equitable jurisdiction.

In the Jewett case, 156 Fed. 160, Judge Carling thought that the effect of the two cases was to leave the jurisdiction in equity unimpaired in the Circuit Court, saying: "If this Court has no jurisdiction over the case stated in the bill, then complainant has no remedy; but this certainly can not be true."

Judge Newman compared and considered both cases in Kiser Company v. Central of Georgia Railway Company, 158 Fed. 193, and arrived at the conclusion that a provisional injunction should be granted, pending an investigation of the reasonableness of the rates in question by the Interstate Commerce Commission. This case is now under consideration by the Commission.

A similar conclusion was reached by Judge Speer in the instant case, and a like injunction was granted.

Trans. page 121 et seq.; 163 Fed. 738.

Judge Whitson, upon authority of the Abilene case, declined to grant an injunction upon a bill filed after the rate had gone into effect, and complaint had been made to the Interstate Commerce Commission. Potlatch Lumber Company v. Spokane, etc., R. Co., 157 Fed. 588. In this position he was sustained by the Circuit Court of Appeals for the Ninth Circuit in the case of Great Northern R. Co. v. Kalispell Lumber Company, 165 Fed. 25.

The question was first presented to an appellate court in the case of Northern Pacific Ry. Company v. Pacific Coast Lumber Manufacturers' Association, 165 Fed. 1, decided by the Circuit Court of Appeals for the Ninth Circuit on October 5th, 1908. Upon consideration of the Abilene case the Court declared that the decision left untouched the question of the right of the shipper to resort to equity to enjoin an unreasonable advance in rates; and that this was expressly recognized by the Supreme Court in the later case of Southern Railway Co. v. Tift.

Commenting on the Tift case, the Court said:

> "Evidently its purpose was to make it clear that the question of the jurisdiction of the Circuit Court to entertain such a bill as is here before us was not presented, and had not been adjudicated in the Abilene Cotton Oil Company case, and that its decision was not deemed essential to the disposition of the case then before the Court. So far as the Supreme Court is concerned, therefore, the question now under consideration is an open one."

The conclusion of the Circuit Court of Appeals is then stated as follows:

> "Upon a careful consideration of the Interstate Commerce Act we find no ground on which to say that it impliedly denies the equitable jurisdiction to enjoin a threatened injury such as is alleged in the bill in the present case."

> "Not only is there no prohibition of other remedies in the Intestate Commerce Act, but in Section 22 there is express provision for the conservation of existing remedies. This can only mean that it was the intention of Congress to permit recourse to all appropriate remedies, not inconsistent with the scheme and purpose of the Act, for the protection of rights accorded by the Act and redress of wrongs arising thereunder."

The Circuit Court (Judges Hanford and Wolverton presiding) had granted injunctions pending an investigation of the reasonableness of the rates by the Interstate Commerce Commission. This was affirmed by the Circuit Court of Appeals (Judge Ross dissenting). See also Union Pacific R. Company v. Oregon, etc., Association, 165 Fed. 13.

In the case at bar the Circuit Court of Appeals for the Fifth Circuit (Judge Shelby dissenting) took a contrary view, and held upon authority of the Abilene case that this power of injunction had been impliedly withdrawn from the Courts, as being inconsistent with the Act to Regulate Commerce.

That the right of the Circuit Court to enjoin a threatened unreasonable advance in rates is left unimpaired, has been held by the following Judges: District Judges Carling, Newman, Speer and Hunt, and Circuit Judges Gilbert, Morrow and Shelby. The

contrary view was taken by Circuit Judges Pardee, McCormick and Ross. District Judge Whitson and the three Circuit Judges of the Ninth Circuit thought the remedy by injunction no longer available after the rates had gone into actual effect, and the complaint had been filed with the Interstate Commerce Commission.

Abilene Case Distinguished.

In the Abilene case it was held that an action at law for the recovery of damages in a state court was subversive of the purposes and requirements of the Interstate Commerce Act, and hence no longer available. The reasons assigned by the Court may be summarized as follows:

(a) The plaintiff would receive a preference or discrimination over other shippers against whom the established schedule of rates would continue to be enforced.

(b) Different courts and juries in different jurisdictions might reach different conclusions concerning the reasonableness of the rates; thereby rendering impossible a uniform standard of rates, such as is required by the act.

(c) This would lead to favoritism, by enforcing one rate in one jurisdiction, and a different rate in another.

(d) Not only might the courts disagree, but there might be divergence of opinion between the court and the Commission as to the reasonableness of the rates.

(e) A recovery would enure to the benefit of the plaintiff alone and affect only the particular case.

(f) The action would be predicated upon the refusal of the carrier to charge or accept less than the established rates, which by the law is made a crime.

None of these reasons apply against the granting of the equitable remedy.

(a) The injunction would operate in favor of all shippers and the public; and so no preference would be obtained by the complainant.

(b) A federal court of equity, having full jurisdiction of the subject and the subject matter, its decree would suspend the entire through rate until its reasonableness could be determined by the tribunal appointed by law; and hence there could be no divergence of opinion between courts in different jurisdictions.

(c) There can be no divergence of opinion between the court and the Commission for the court does not determine whether established rates are reasonable, but only temporarily suspends the exaction of a threatened advance in rates until the question of their reasonableness can be passed upon in the first instance by the Interstate Commerce Commission.

(d) The relief is not predicated upon the refusal of the carrier to do an unlawful act by charging less than the established rates, but is granted only in order to preserve the status pending an adjudication of the question involved, according to the methods established by law.

The fundamental difference between the Abilene case and the case at bar lies in this: In the one case a state court of law was called upon to determine in the first instance the reasonableness of the existing

rate which had been established in conformity with the requirements of the statute, while in the case at bar the jurisdiction of a federal court of equity is invoked to prevent the enforcement of a threatened advance in rates alleged to be unjust, unreasonable, and unlawful, and thus preserve the status until the Interstate Commerce Commission can, in the first instance, consider and determine the question of reasonableness.

This essential difference has been recognized by this Court in the case of Southern Railway Co. v. Tift 206 U. S. 428, where it was said:

> "We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the Interstate Commerce Act, a suit in equity is also forbidden to prevent the filing or enforcement of a schedule of unreasonable rates, or a change to unjust and unreasonable rates."

In the case of an action at law for damages the judicial remedy has only been **postponed**, for the reasons assigned in the Abilene case. In such cases the jurisdiction of the court has only been suspended until an appropriate tribunal established by law can in the first instance pass upon the question of fact involved. The relief afforded by this method of procedure is considered ample redress on a legal cause of action, for that a final recovery would include not only the excess in rates paid, but also interest and attorney's fees..

A denial of the right of the court to grant equitable relief in proper cases would work an **entire destruction of the right itself**, and subject the aggrieved parties to irreparable loss. Since there is no other tribunal competent to administer the preven-

tive relief, the strong arm of chancery would be paralyzed in the exercise of one of its most beneficient functions:—the prevention of threatened wrong that would occasion irreparable injury. The shipper would be remediless. A grievous situation would be presented, wherein Congress had expressly recognized a right, and had at the same time taken away the only remedy adequate for its protection.

Interstate Commerce Commission has No Judicial Power.

The Interstate Commerce Commission has no power to suspend or postpone, pending an inquiry, a threatened advance in rates, no matter how unjust, unreasonable and harmful it may be; nor can it exercise any other judicial power.

Interstate Com. Com. v. C. N. O. & T. P. P. R. Co. 167 U. S. 479.

Ky. & I. Bridge Co. v. L. & N. R. Co. 37 Fed. 612.

"If such is the effect of the act we have the anomalous situation of a threatened injury for which there is no remedy, for the Interstate Commerce Commission has no power to enjoin a proposed unreasonable new schedule of rates. To what does the reservation of legal remedies in Section 22 of the act refer if not to such a remedy as this?"

Northern Pac. R. Co. v. Pacific Coast Lumber Manufacturers' Asso. 165 Fed. 1, 8.

"It is, however, insisted that the power of the court cannot be exercised until the Interstate Commerce Commission has acted, but that Commission is expressly denied the power of injunction or any other judical power. This, it has been conclusively held, remains with the courts. How, then, can it be said that the original and plenary power of the court of

equity in such matters must be postponed to await the action of the Interstate Commerce Commission?"

Tift v. Southern Railway Co. 123 Fed. 789, 794.

It is not to be supposed that Congress intended to take from the citizen this right, and from the court this power, without vesting it in some other judicial tribunal, capable of affording appropriate relief. A matter of so vital importance, involving such vast interests, would not have been left to implication.

Special Remedies Not Exclusive.

Section 22 of the Act declares in express terms that the special remedies provided in the Act were to be cumulative and not exclusive of appropriate judicial remedies then existing.

Even in the absence of this section, judicial remedies existing at the time, appropriate to protect or enforce the rights declared in the act, would be construed to have been adopted as a part of the law itself.

"The clause is concerned alone with the rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

Texas Pac. R. Co. v. Abilene etc. Co. 204 U. S. 426, 446-7.

The act of August 7th, 1888, imposing certain duties upon all railroad and telegraph companies to which the United States had granted any subsidy,

gave a special remedy by mandamus. This court in the case of United States v. Union Pacific R. Company, 160 U. S. 1, declared that the United States was not restricted to the statutory remedy, but could enforce a compliance with the act by a bill in equity.

"In addition to that, a remedy by mandamus in the District and Circuit Courts is given to an interested person to compel compliance by the common carrier with the provisions of the act. As this latter proceeding is denominated cumulative in the statute, it does not prevent the remedy by injunction; nor would it in any event, because the inadequacy of the legal remedy, which justifies equitable intervention by injunction, is only the inadequacy of a recovery in damages by action at law. Attorney General v. Mid Kent R. Co. L. R. 3 Chan. App. 100."

Toledo v. Penn. Co. 54 Fed. 730.

"It is difficult to accept the argument that the Interstate Commerce Act was intended to deprive the shipper of this right. The Act was drawn with the broad purpose to facilitate interstate commerce, and to restrict the arbitrary exercise of power by common carriers. It afforded special remedies for this purpose, but these appear to us to have been intended to supplement, and not to supplant, the remedies which the citizen already enjoyed."

Tift v. Southern Ry. Co. 123 Fed. 789-792.

"The argument for the demurrer proceeds, however, upon the theory that the jurisdiction of the court here is limited by the provisions of the Interstate Commerce Act prescribing certain remedies which may be taken in this court for its enforcement. It is hardly necessary to decide that question; but, if it be, there can be but little doubt that the plenary jurisdiction of this court to entertain all controversies arising under an act of Congress, either at law

or equity, has not been abbreviated by this act in relation to controversies arising under it, but the special remedies, so far as they are special, are merely supplementary to the ordinary remedies existing under the subsisting judiciary act, which governs all our jurisdiction. This is fairly inferable, if not directly decided, from the decision of Circuit Judge Jackson, just cited, (Ky. & I. Bridge Co. v. L. & N. R. Co. 37 Fed. 612,) and in my judgment there can be no doubt of this, whether it has been so decided or not. Whatever jurisdiction a court of equity may entertain of this controversy may be entertained here, if not under the regulations of the Interstate Commerce Act, prescribing certain remedies, then under the judiciary act, giving us the powers of an equity court as to all cases and controversies arising under any act of Congress."

Little Rock v. E. T. V. & G. 47 Fed. 771, 773-4.

The relief in equity is not inconsistent with nor destructive of the provisions of the act; on the contrary it is an appropriate remedy in aid of the great purpose underlying the action of Congress;—to facilitate commerce by protecting the right of shippers and the public to transportation at just, reasonable and equal rates.

In the case at bar the Circuit Court found that the rates prescribed, and about to be enforced, were prima facie unjust, unreasonable, and unlawful; and by its order suspended the enforcement of the rates until the question of reasonableness could in the first instance be passed upon by the Interstate Commerce Commission. The Court was entitled to the aid of this expert tribunal "appointed by law and informed by experience."

East Tenn. V. &. G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1.

Ky. & I. Bridge Co. v. L. & N. R. Co., 37 Fed. 567.

No Invasion of Exclusive Domain of the Commission.

Whenever it is shown that an advance in rates about to be made effective is prima facie unreasonable, unjust, and unlawful, and that its enforcement would occasion irreparable loss to the complainants and other shippers, it is the right and duty of the court to preserve the status until the question can be adjudicated according to the methods established by law. It is therefore both logical and consistent that the court should preserve the status until the Commission can, in the first instance, consider the question of reasonableness. Such injunctions do not prevent either the filing or establishment of the rates, but only forbid the collection of the advance pending the inquiry. The Commission retains the exercise of all of the rights and powers conferred upon it by law, as completely and as effectively as if the injunction had not been granted. The court protects the rights of the parties and of the public by preserving the status pending the exercise by the Commission of its statutory jurisdiction.

There is thus preserved to each tribunal the exercise of its proper functions, so that neither invades the domain of the other.

"The case calls for the exercise of a power which is inherent in a court of chancery, the power to enjoin a proposed unlawful act. The exercise of that power does not invade the province of the Interstate Commerce Commission. It prohibits the enforcement of an alleged unreasonable rate only until the Commission shall have had the time and opportunity to adjudge the question of its unreasonableness. To afford such relief is not to fix rates, or to change existing rates, or to decide on the reasonableness of established rates, or in any way to interfere with the functions of the Interstate Commerce Commission; nor does it result in the confusion or derangement of

rates so forcibly pointed as the ground of decision in the Abilene Cotton Oil case."

Northern Pacific Ry. Co. v. Pacific Coast Lumber Mfgrs' Asso. 165 Fed. 1, 8.

Reply to Argument of Inconvenience.

The effect of an injunction in this case would not be the throw the interstate rates of the Southeastern territory into disorder and confusion, as Judge Pardee feared. Trans. page 183. Nor would it result in an unjust discrimination against other persons or other localities, as counsel for the appellees argued in the Court below, and doubtless will argue here.

It is true that the advance complained of was not confined to points in Georgia, but extended to other destinations within the territory of the Southeastern Freight Association.

Neither confusion nor discrimination would result from the injunction granted by the Circuit Court. If the reasons for equitable relief exist in other States, it is to be presumed that the Federal Courts would, in proper cases, grant like injunctions. If the Georgia shippers are entitled to an injunction under the law and facts of this case, shippers in other localities would also be entitled to like relief, if the circumstances and conditions are substantially similar; and the failure of such shippers to assert their rights cannot prejudice us in the enforcement of our rights. If the circumstances and conditions are dissimilar, and such shippers cannot show themselves to be entitled to relief, there can be no discrimination, either in law or fact, resulting from the court's granting appropriate relief. We can not be made to suffer irreparable injury because other persons in other localities refuse to seek relief, or are not entitled to relief.

During the course of the argument in the court below, Judge Pardee expressed the thought that, should the injunction be operative, shippers in those

towns in Georgia not reached by the lines of either of the appellees might be forced to pay the higher rates prescribed, and thereby shippers at points along the lines of the appellees would enjoy an advantage or undue preference. This fear is unfounded in fact. There is not a town in the State of Georgia that is not served by the lines of the appellees, or whose interstate rates are not based on or made with relation to cities and towns reached by the lines of the appellees, or by their leased lines. Rates to strictly local points are based on the near by common points —that is, those points served by two or more lines, where competition is supposed to exist; while through or interstate rates to the lesser points are made with relation to such rates to the larger and more important centers. Hence it is that a reduction in through rates to any of these more important points enures to the benefit of all points within the territory. This would be true, even if the tariffs were not in fact constructed on this basis, because any intelligent shipper would take advantage of a combination of rates that was less than the through rate over other lines. Even if it was otherwise there would be no unjust discrimination. The shippers in the towns subjected to the payment of the higher rates, could appeal to the court granting the injunction, and it can scarcely be doubted that upon proper proceedings the injunction order would be appropriately enlarged and extended.

The record in the Tift case was before the Circuit Court, which was the Court of original jurisdiction in that case also. Trans. page 115. The final decree in the Tift case granted an injunction against the advance in rates to Georgia shipping points. 138 Fed. 753. After the decision of the Supreme Court (206 U. S. 428) the defendant carriers restored the old rates in Georgia, but continued to maintain the advance to points in Florida and Alabama for a considerable time and until forced to withdraw the ad-

vanced rates by ancillary and supplemental proceedings in the Tift case.

In that case the carriers did not think this disparity worked any unjust discrimination, or threw the rates in the Southeast into disorder and confusion.

The contention that the granting of an injunction in this case would operate to bring about disorder and confusion is merely an argument of inconvenience, which cannot affect the jurisdiction of the Court.

THIRD.

Jurisdiction in Equity Having Been Vested in the Courts of the United States by the Constitution, the Exercise of That Jurisdiction in Proper Cases Can Not Be Taken Away By Legislation of Congress.

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Constitution United States, Article III, Section I.

The language of this clause of the Constitution is mandatory and imperative upon Congress.

"The judical power of the United States shall be vested (not may be vested) in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish * * * * If it is the duty of Congress to vest the judicial power of the United States, it is the duty to vest the whole judicial power. The language, if imperative as to one part,

is imperative as to all. If it were otherwise this anomaly would exist, that Congress might successfully refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all, but the Constitution has not singled out any class on which Congress are bound to act in preference to others."

Martin v. Hunter, 1 Wheat. 328.

It is conceded that Congress may distribute this judicial power among such inferior courts as it may ordain and establish; and that the jurisdiction of such inferior courts, as courts of the United States, may be subject to such limitations and exceptions with respect to the amount in controversy, the qualification of the parties, and the place of bringing suit, as Congress may prescribe.

Nevertheless Congress must provide for the exercise of the whole of the judicial power by some inferior court.

Under this clause of the Constitution it became the duty of Congress to pass such laws as were necessary and proper to carry into execution the powers vested in the judicial department.

Ableman v. Booth, 21 How. 521.

The civil jurisdiction of the Circuit Court was, by the act of March 3rd, 1875, enlarged to the entire extent of the judical power delegated by the terms of the Constitution.

Louisiana State Lottery Co. v. Fitzpatrick, 3 Woods, 222. 15 Fed. Cas. No. 8541.

Congress cannot vest any portion of the judicial power of the United States in any tribunal other than the inferior courts ordained and established by itself.

Martin v. Hunter, 1 Wheat. 330.

The Interstate Commerce Commission is not invested, and under the Constitution could not be invested, with judicial power.

"It is well settled that Congress, in ordaining and establishing 'inferior courts', and prescribing their jurisdiction, must confer upon the judges appointed to administer them the constitutional tenure of office, —that of holding 'during good behavior,'—before they can become invested with any portion of the judicial power of the government; and if the act to regulate commerce does in fact establishes an inferior court, the commissioners appointed thereunder for certain fixed periods are clearly not such judges as can be invested with any portion of the judicial power of the United States, and their decision in matters affecting personal or property rights could have no force or validity. But does the Interstate Commerce Law undertake either to create an 'inferior court', or to invest the Commission appointed thereunder with judical functions? We think not."

"Without reviewing in detail the provisions of the law, we are clearly of the opinion that the Commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court, or its action judicial, in the proper sense of the term."

Kentucky & I. Bridge Co. v. L. & N. R. Co. 37 Fed. 612, 613.

Interstate Commerce Commission v. Cin. etc., R. Co., 76 Fed. 183.

Congress itself can exercise no judicial power, and therefore will be incompetent to confer it upon any tribunal, other than an "inferior court" duly ordained and established.

"If the investigation which the committee was directed to make was judicial in its character, and

could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constituton to the judicial and not to the legislative department of the government."

Kilbourn v. Thompson, 103 U. S. 196.

The Interstate Commerce Commission in the course of the investigations committed to it exercises quasi-judicial functions; but this is very different from the exercise of judicial power. Every officer or department of the government, which is called upon to consider facts and arrive at conclusions, necessarily exercises a judicial function. Only courts authorized to hear and decide controversies, and to carry their judgments into effect by their own process, can be said to exercise any part of the judicial power. Congress may by law impose duties upon executive and ministerial officers of the government, which require them to consider and determine questions of law and of fact, but in so doing they do not exercise judicial power.

State v. Sullivan, 50 Fed. 599.

Congress Cannot Withdraw Judicial Power From The Courts.

When Congress has prescribed the essentials to the exercise of jurisdiction by the Circuit Court as a Court of the United States, and these requirements have been complied with, Congress cannot deny to the Court the exercise of its jurisdiction in the granting of relief appropriate to the law and facts of the case.

"To avoid misconstruction upon so grave a subject we think it proper to state that we do not consider

Congress can either withdraw from judicial cognizance any matter which from its nature is the subject of a suit at the common law or in equity, or admiralty; nor on the other hand can it bring under the judicial power a matter which from its nature is not a subject for judicial determination."

Mr. Justice Curtis, in Murray v. Hoboken Land Co., 18 How. 272.

Interstate Com. Com'n. v. Brimson, 154 U. S. 447-475.

This Court has recently considered this subject, and has very clearly defined the principle in the late case of Kansas v. Colorado, 206 U. S. 46. On page 83 of the opinion Mr. Justice Brewer, after quoting from Section 1 of Article III of the Constitution that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish," said:

> "By this is granted the entire judicial power of the nation."

Referring to Section 2 which provides that the judicial power shall extend to all cases in law and equity arising under the Constitution and laws of the United States, it was said that this "is not a limitation nor an enumeration."

"It is a definite declaration,—a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations upon that grant of power, but, if there are any, they must be expressed; for otherwise the general grant would vest in the courts all the judicial power which the new nation was capable of exercising."

The Court further declared:

"Speaking generally it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, and the parties to which or the property involved in which may be reached by judicial process, and, when the judicial power of the United States was vested in the Supreme and other courts, all the judicial power which the nation was capable of exercising was vested in those tribunals; and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto." * * * *

"These considerations lead to the propositions that when a legislative power is claimed for the national government the question is whether that power is one of those granted by the Constitution either in terms or by necessary implication; whereas, in respect to judicial functions, the question is whether there be any limitations expressed in the Constitution on the general grant of national power."

This Record Presents a "Case" Within the Judicial Power.

Section 2 of Article III of the Constitution provides "That the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority," etc.

The Constitution recognizes the distinction between law and equity, and vests equitable jurisdiction in the courts of the United States, to be exercised as defined and enforced by the English High Court of Chancery.

Fenn v. Holme, 21 How. 484.
Thompson v. R. R. Co. 6 Wall 137.
Payne v. Hook, 7 Wall. 430.

Penn v. Wheeling Bridge Co. 13 How. 563.

Murray v. Chicago, etc., R. Co., 62 Fed. 24-28.

When therefore a case in equity within the jurisdiction of the Circuit Court as a Court of the United States is presented, that Court must proceed to exercise its equitable jurisdiction and grant appropriate relief. A controversy presented in a bill filed by shippers against common carriers to enjoin a threatened advance in rates, which is alleged to be unjust, unreasonable and unlawful, is a case within the meaning of the Constitution, to which the judicial power extends.

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

Osborn v. Bank of U. S., 9 Wheat. 738, 819.

"Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting on it, then it becomes a case or controversy."

Mr. Justice Field, in Smith v. Adams, 130 U. S. 167.

FOURTH.

The Reasonableness of an Established or Prescribed Rate is Eminently a Judicial Question, Requiring Due Process of Law for its Determinatoin.

"The question of the reasonableness of the rate charged for transportation by a railroad company involving as it does the element of reasonableness both as regards the company, and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."

Chicago etc. R. Co. v. Minnesota, 134 U. S. 418-458.

Reagan v. Farmers Loan & Trust Co. 154 U. S. 398.

Covington, etc. Turnpike Co. v. Sanford, 164 U. S. 578, 592-3.

Interstate Com. Com'n. v. Cincinnati, etc., R. Co., 167 U. S. 479.

Smyth v. Ames, 169 U. S. 466-523.

Chesapeake, etc. Tel. Co. v. Manning, 186 U. S. 244.

When a triff of rates has been filed with the Interstate Commerce Commission in accordance with the requirements of the Act to Regulate Commerce, these rates will become legally effective thirty days thereafter. No action on the part of the Commission can suspend the rates or prevent their becoming effective at the time designated. The carriers filing the tariff can not withdraw or change the rates therein set out, except by filing a new tariff to become effective after the expiration of the statutory thirty days notice. The Commission may permit the new tariff to become effective on shorter notice; but this is a discretion which the Commission is reluctant to exercise, because the policy of the law seems to require thirty days notice in order that shippers and the public may have time in which to adjust their business relations to the proposed changes in rates, as well as to prevent the manipulation of rates by sudden changes.

When therefore tariffs have been filed with the Commission, and the statutory notice has been given, the rates therein set out have been prescribed in ac-

cordance with law; their enforcement only has been postponed to await the expiration of the statutory period.

Such rates being prescribed the question of their reasonableness becomes the subject of judicial inquiry; and since the rates have not gone actually into effect, the court may properly enjoin their enforcement until their reasonableness shall have been determined according to the methods appointed by law.

"Whether existing or prescribed rates and charges for a public service afford reasonable compensation is a judicial question."

Madison v. Madison Gas Co., 8 L. R. A. New Series, 529-536.

Inquiry into such rates falls within the definition of the judicial power given in Prentis v. Atlantic Coast Line R. R. Co., 211 U. S. 210, wherein Mr. Justice Holmes said:

> "A judical inquiry investigates, declares, and enforces liabilities as they stand on present or past facts, and under laws supposed already to exist. This is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making new rules to be applied thereafter to all or some part of those subject to its power."

When tariffs have been filed and the notice given, the function of the carriers in prescribing rates has been fully and completely exercised; nothing more remains for the carriers to do in order for the rates to become legally effective. The question then is whether at the time the determination was reached the carriers were justified in making the advance. The appropriate time to challenge an advance in

rates, and to call upon the carrier to explain it, is when the advance has been announced in accordance with the statutory requirements. The act is complete in so far as the carrier is concerned, and it should then be prepared to give the reasons justifying the advance.

In the case at bar the carriers did not attempt to justify or explain the advance, but by their demurrer admitted the truth of the allegations of the bill and the proof submitted.

The court, having found that the proposed rates were prima facie excessive and unlawful, pursued the proper method by suspending their enforcement, pending an adjudication. This is the most expeditious and economical method that can be adopted, and serves the interest of the carriers as well as the public, while protecting shippers against irreparable injury.

In cases where rates have been prescribed, but not yet enforced by state railway commissions, the federal courts have assumed jurisdiction; and where the schedules of rates were found to be unreasonable and confiscatory, they have been enjoined. In such cases the court does not undertake to declare what shall be a reasonable charge to be exacted in the future, but simply annuls the unlawful rates involved. The granting of such injunctions in no manner prevents the state commissions from the further exercise of their legislative power in making or changing rates. When the Supreme Court finds that an order of the Interstate Commerce Commission is unlawful, the Court does not proceed to determine what shall be considered reasonable in the future, but remits the question back to the Commission.

Texas & Pac. R. Co. v. Abilene, etc. Co.
204 U. S. 426, 444.

L. & N. R. Co. v. Behlmer, 175 U. S. 648.

East Tenn. V. & G. R. Co. v. Interstate Com. Com. 181 U. S. 1.
Interstate Com. Com. v. Chicago B. & Q. R. Co. 186 U. S. 320.

A court in provisionally enjoining an unlawful advance neither passes upon the reasonableness of established rates, nor does it determine what rates shall be charged in future. These questions are referred to the Interstate Commerce Commission, the court in the meantime protecting the rights of all concerned.

Due Process of Law Requires Judicial Inquiry.

To deny the shipper the right to invoke protection against a change to excessive and unlawful rates, according to judicial methods, would be in effect to deprive him of his property right—and pro tanto of the property itself—without due process of law. The right to transportation at just and reasonable rates is a right of property; as much so as the right of the carriers to receive fair compensation for the transportation service performed by them.

Smyth v. Ames, 169 U. S. 466.

These rights are mutual; the one is just as sacred and just as deserving of the protection of the law as is the other.

"The interstate commerce act confers upon each citizen engaged in productive industry, whether manufacturing, commercial or agricultural, within the districts traversed by these roads, the substantive right of having his product transported by the common carriers of the country at rates equal to the rates obtained by his competitor. This right of equal treatment at the hands of the common carriers is as much a right of property, and affects as directly his interest in property as any other right of property that he may have under the law, statutory or

common. To enforce such right, there must be somewhere in our system of jurisprudence, the remedy found essential. If an action at law for damages is inadequate, a remedy in equity must exist. The jurisprudence of the country does not leave him remediless."

United States v. Mich. Cent. R. Co., 122 Fed. 545.

Railways in this country perform a governmental function, and in the nature of the case are practical monopolies. Texas & Pacific R. Co. v. Int. Com. Com. 162 U. S. 197. When property is devoted to a public use the public acquires an interest in that use. Munn v. Illinois, 94 U. S. 113. In the absence of judicial restraint railways can, by the imposition of unequal and extortionate rates, destroy the value of property and clog the channels of commerce. Legislative limitation upon the rates and charges of common carriers is justified upon the ground of securing the citizen in the enjoyment of his propetry rights, in accordance with the fundamental principles underlying all constitutional governments. If the citizen has no property right to transportation at just, reasonable, and equal rates, governmental regulation of charges would be scarcely less than the arbitrary exercise of power.

The right of a carrier to injunctive relief against unjust and confiscatory rates about to be imposed by a state, or under its authority, is too well established to require citation of authority. The familiar ground of such relief is that such unjust rates will deprive the carrier of its property without compensation and without due process of law, in violation of the Fourteenth Amendment. So when carriers have prescribed and are about to exact excessive and unjust rates, destructive of property rights, the shipper is entitled to invoke judicial relief; and

even Congress, with all its reach and power, cannot deprive him of this right without violating the Fifth Amendment. "He who felt aggrived by a charge could always invoke the aid of the courts to **protect himself against it.**" Chicago etc. R. Co. v. Osborne, 52 Fed. 912. A citizen is entitled under the Constitution to a judicial hearing and determination of his controversy in a court of competent jurisdiction having power to enforce its own process. He cannot be remitted to a tribunal judicially incapable of affording adequate relief, pending a hearing before which the litigant may be destroyed.

To hold that the Circuit Court cannot grant relief would be equivalent to holding that Congress has licensed transportation companies, by filing rates as unreasonable and unjust as they may see fit to make them, to deprive individuals and great industries affecting the prosperity and happiness of entire states, of their property without any process of law. This is true because the remedy which the Commission might grant after much delay would not come until the loss and destruction was accomplished; and should the Commission refuse relief there would be no appeal.

FIFTH.

A Court of Equity May at the Suit of Private Persons Enjoin Specific Acts Of An Unlawful Combination Which Will Occasion Special Injury, Irreparable in its Nature.

It is not sought in this case to have the court decree a dissolution of the Southeastern Freight Association. We recognize that only the government can maintain, as against such combinations, a suit for the general injunction authorized in the Sherman Anti-Trust Act; and that such combinations can be dissolved at the suit of the government only. We do,

however, respectfully contend that private persons may invoke the aid of the courts for preventive relief against specific acts resulting from the unlawful conspiracy, and causing irreparable injury to the complainants, notwithstanding that the act is criminal or penal in its nature. It is like a public nuisance that can be abated only at the instance of the State; yet private persons having a special interest, and suffering special damage, may protect their rights by injunction.

If the threatened wrong is such that the government may obtain a general injunction, any person may enjoin specific acts occasioning special injury.

5 Pomeroy Eq., 478.

The Advance Was Result of Unlawful Combination.

The allegations of the bill regarding the unlawful combination which produced the advance, are positive and specific. The Nashville, Chattanooga & St. Louis Railway is controlled by the Louisville & Nashville Railway Company through the ownership of its capital stock; while the Atlantic Coast Line Company, a holding corporation, owns or controls both the Louisville and Nashville and the Atlantic Coast Line Railroad Company, thus composing one large system of railway lines, extending from Ohio and Mississippi River crossings into southeastern territory. The Cincinnati, New Orleans & Texas Pacific Railway is owned or controlled by the Southern Railway, thus constituting another large system with continuous lines from the river crossings into the southeast. There is no other system having its own continuous lines to and from the territories named. Hence these two systems can and do fix and maintain rates from the west into the southeast; and, being naturally competing systems, any combination, agreement or understanding between them whereby

rates are advanced and maintained, in suppression of competition.

Trans. pages 4, 51-53.

The advance in question was made by these two systems, in conjunction with other carriers, acting through the medium of the Southeastern Freight Association, an illegal combination in restraint of trade and in destruction of fair competition. (Trans. page 3.) The lines composing the competing systems mentioned, having agreed upon the advance, joined in and filed with the Southeastern Tariff Association a writing, known as a declaration, announcing that the advance would be made effective on August 1st, 1908. In this declaration the Central of Georgia Railway Company also joined. This declaration was communicated by the Chairman of the Association to all interested lines, in the form of a circular designated as "Information Issue No. 517." All of the interested lines and their connecting carriers, acting through this Association, concurred in this advance, being forced to do so or retire from the traffic.

Trans. pages 5-6.

Under the rules of the Southeastern Freight Association the proposed advance was "suggested" to the "conference committee" composed of traffic officials of the members of the Association. (Art. II, Section 2, Trans. pages 89-90.) The "declaration" was docketed by the Chairman for consideration of the conference committee (Rule 5, Trans. page 93); and was referred to a subcommittee for recommendation. (Rule 3, Trans. page 93.) Since the conference committee is not authorized to act on the matter further than to make a recommendation, the executive committee must determine the question. This executive committee is composed of a superior officer of each constituent member, and represents the personnel of the Association. (Art I, Section 1, Trans. page 89.) The advance in question must have

been approved by all of the interested lines, since it requires unanimous action on the part of the members of the executive board present to adopt any motion or resolution, so that the objection of any member would have been fatal to the advance.

Art. I, Section 5, Trans. page 89.

The carriers proposing the advance filed their tariffs with the Commission, setting out the identical advances to be made effective on the same day; in which tariffs some 73 participating carriers concurred. (Trans. page 6.) It is plain that the advance was the result of understandings and agreements between the interested lines, acting through the medium of a common agency. The bill in terms avers that the increase in rates will operate in restraint of interstate trade by restricting the volume of the traffic, by reducing the business of the complainants (appellants), and by depriving the consuming public, or some part thereof, of the ability to purchase and use these necessary commodities to the extent to which they are entitled. (Trans. page 8.) It is distinctly charged that the advance in rates complained of "was and is the direct outcome of understandings and agreements in suppression of competition, and an unlawful combination in restraint of interstate trade arrived at and made effective through the agency of the Southeastern Freight Association, and other affiliated associations; and that the acts of such combination in advancing rates is the result of a conspiracy which is unlawful as well at common law as under the statutes of the United States."

Trans. pages 7-8.

The facts pleaded are admitted by the demurrer.

Such a combination of competing and connecting rail lines, producing an identical increase in freight rates by concurrence of action and effective under-

standings according to the machinery employed, must be condemned as in suppression of competition, and therefore unlawful.

The statute declares illegal every contract, combination or conspiracy in restraint of commerce among the several States; and any combination between competing carriers engaged in interstate commerce for the purpose of maintaining rates or preventing competition, directly restrains interstate commerce and contravenes the federal statute.

Noyes on Intercorporate Relations, 2nd Edition. Sec. 398, p. 734.

United States v. Trans-Missouri Freight Ass'n., 166 U. S. 290.

In the case of Northern Securities Co. v. United States, 193 U. S. 197, Mr. Justice Harlan, speaking for the Court, said, among other things:

> "That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy or monopoly upon such trade or commerce.
>
> "That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;
>
> "That combinations even among private manufacturers or dealers whereby interstate or international commerce is restrained are equally embraced by the act;
>
> "That Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the Anti-Trust

Act, has prescribed the rule of free competition among those engaged in such commerce;

"That every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce is made illegal by the act;

"That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce;

"That to vitiate a combination, such as the act of Congress condemned, it need not be shown that the combination in fact results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or to deprive the public of the advantages that flow from free competition."

"That free and unrestricted competition in the matter of railroad charges might be productive of evil does not militate against the fact that such is the law now governing the subject . . . The time may come when the companies will be relieved from the operation of this law, but they can not, by combinations and agreements among themselves, bring about this change. The fact that the provisions of the Interstate Commerce Act may have changed in many respects the conduct of the companies in the carrying on of the public business they are engaged in does not show that it was the intent of Congress in the enactment of that statute, to clothe railway companies wih the right to combine together for the

purpose of avoiding the effects of competition on the subject of rates."

United States v. Freight Assn., 166 U. S. 290, 337.

The language just quoted is from the dissenting opinion of Judge Oliver P. Shiras in the United States Circuit Court of Appeals in the Trans-Missouri case, as quoted and virtually adopted in the opinion of Mr. Justice Peckham in that case in the Supreme Court of the United States.

Private Persons May Invoke Equitable Relief Against the Harmful Acts of Such Unlawful Combination.

The question remains whether private persons, suffering special injury from particular acts resulting from the unlawful combination, may protect themselves by injunction.

"When an irreparable and continuing unlawful injury is threatened to private property and business rights, equity will generally enjoin on behalf of the person whose rights are to be invaded, even though an indictment on behalf of the public will also lie. See the cases cited in section 20 of High on Injunctions."

Toledo, A. A. & N. M. Ry. Co., v. Pennsylvania Co., 54 Fed. 745.

In the case of Steamship Co. v. McGregor, 23 Q. B. Div. 598, 624, Lord Justice Frye said:

> "I can not doubt that whenever persons enter into an indictable conspiracy, and that agreement is carried into execution by the conspirators by means of an unlawful act or acts which produce private injury to some person, that per-

son has a cause of action against the conspirators."

Quoted with approval by Taft, J., in Toledo v. Penna. R. Co., 54 Fed. 730.

Citing also:

Buffalo Lubricating Oil Co. v. Standard Co., 106 N. Y. 669.

Steamship Co. v. McKenna, 30 Fed. 48.
Carew v. Rutherford, 106 Mass. 1.
Moore v. Brick Layers' Union, 23 Wkly. La. Bul. 48.

In the Toledo case the following quotation is made from the opinion of Lord Justice Brett in Bowen v. Hall, 6 Q. B. Div. 333, 337:

> "Whenever a man does an act which in law and in fact is an unlawful act, and such an act may as a natural and probable consequence of it produce injury to another, and which in the particular case does produce such injury, an action on the case will lie."

These cases were cited by Judge Taft as authority to sustain an injunction against the violation of Section 3 of the Interstate Commerce Act.

In Springhead Spinning Co. v. Riley, 37 L. J. Chan. 889; L. R. Eq. 551, it was held that although equity has no jurisdiction to enjoin the commission of criminal or unlawful acts, yet in order to protect property it might restrain acts in their nature criminal, provided they were of such a nature as to injuriously affect the rights of the complainant.

This Court held in Bement & Son. v. National Harrow Co., 186 U. S. 70, that the defense that a contract is in violation of the Anti-Trust Act may be set up

by private individuals when sued thereon. The Court said that the first section of the Act made every contract or combination in violation thereof illegal, and that any person was entitled to take advantage of such provision.

In Blindell v. Hagan, 54 Fed. 40, it was held that the Anti-Trust Act did not give a new right to bring a suit in equity, and that only the government was authorized to bring suit against the combination; but that a court having acquired jurisdiction by reason of citizenship of the parties, and that as the alleged injury was irreparable in damages and a multiplicity of suits would otherwise ensue, an injunction would be granted against the unlawful conspiracy. The Circuit Court of Appeals, in affirming this case (56 Fed. 696) said:

> "We concur in the conclusion reached by the learned judge who decided the case below, as expressed in his opinion, and which is made a part of the record, that the jurisdiction is maintainable on general principle of equitable jurisdiction, and a careful examination of the case satisfies us that under all the facts before us there was no error in the Court awarding a preliminary injunction."

A very similar question was presented to the Circuit Court of Appeals for the Fifth Circuit in the case of Gulf, etc., Co. v. Miami Steamship Co., 86 Fed. 447. The Steamship Company alleged that the defendant railway companies were members of an association of railway and steamship lines, organized for the purpose of controlling freight rates, both rail and water, into and from the Southwestern portion of the United States; that the members of said association, under agreements with each other, had established through routes and joint rates to and from New York and other ports; and that they had formed a conspiracy to injure the complainant by

refusing to accept freight from or for it, except upon unjust conditions. The prayer was for mandatory relief to compel the defendants to accept freight from and for the complainant upon the same terms and conditions as were applied by them to other steamship companies, and to grant to the complainant the same pro rata of through rates as were allowed its competitors. The Circuit Court granted an injunction pendente lite. The Circuit Court of Appeals reversed the lower court and dismissed the bill, because the relief prayed was mandatory; but it was intimated (pages 421-22) that if only preventive relief had been asked the cause might have been retained.

The Court made the following comment on the Debs case:

> "In U. S. v. Debs, 64 Fed. 724, the Circuit Court to sustain its jurisdiction relied mainly on the act of July 2nd, 1890. When the case came in review before the Supreme Court in re Debs, 158 U. S. 564, that court entered into no examination of the act of July 2, 1890, preferring to rest its judgment on the broader ground of the general jurisdiction of a court of equity to prevent injury in such cases. The Supreme Court was careful to observe that it must not be understood from its putting its judgment on the broader ground that it dissented from the conclusion of the Circuit Court in reference to the scope of the act. The provisions of the Act in question apply to railroads, and render illegal all agreements made by them which are in restraint of trade or commerce. U. S. v. Association, 166 U. S. 290."

The Court concludes the discussion of this branch of the case in these words:

> "We do not doubt the general jurisdiction of the Circuit Court as a court of equity to afford preventive relief in a proper case against threat-

ened injury about to result to an individual from any unlawful agreement, combination or conspiracy in restrain of trade."

The recent case of Bigelow v. Calumet & Hecla Mining Co., 155 Fed. 839, follows and applies Blindell v. Hagan, and adopts the language of the Court in the Miami Steamship case last above quoted. The Court held that a private party who has sustained special injury by a violation of the Federal Anti-Trust Act, may sue in a federal court for injunction under the general equity jurisdiction of the court, when by reason of diversity of citizenship of the parties the court has jurisdiction of the suit. The case of Minnesota v. Northern Securities Company, 194 U. S. 48, is distinguished; and the Court arrives at the conclusion that the prohibition against injunctive relief under the Anti-Trust Act is limited to suits brought for injuries common to the general public, and that under the general jurisdiction of equity relief may be granted to a private party against violations of the Act.

This case does not fall under authority of Minnesota v. Northern Securities Company, 194 U. S. 48. In that case the State of Minnesota neither alleged nor showed any direct or specific damages, but only set up an injury that would be common to the general public. It was sought to enjoin the illegal combination from continuing as such, and virtually to have its dissolution decreed. In the case at bar special injury is shown, and it is sought only to enjoin the specific unlawful act resulting from the combination, and causing such injury.

SIXTH.

When the Jurisdiction of the Court is Founded Upon a Right Arising Out of the Act to Regulate Commerce, Such Jurisdiction is Exclusive in the Federal Court, and the Defendants May Be Sued Wherever Found.

In this case the requisite diversity of citizenship existed. The question was whether the jurisdiction rested only on that fact, or whether it was attributable to the existence of a federal question. The Circuit Court thought that a federal question was presented, saying on this point:

> "It is true that in this case the illegality of the alleged increase in rates must necessarily in large measure be determined by the federal law."
>
> Trans. page 108; 163 Fed. 736.

The Circuit Court of Appeals expressly held that a correct determination of the case directly depended upon the proper construction of the Act to Regulate Commerce. Judge McCormick, speaking for the Court, said:

> "We conclude that the bill in this case presents for necessary consideration the proper construction of the Act to Regulate Commerce, and therefore the jurisdiction of the Court does not rest solely upon the diversity of the citizenship of the parties."
>
> Trans. page 182; 166 Fed. 218-19.

The alternative propositions upon which we rely may be stated as follows:

If the jurisdiction of the Court is found upon a federal question arising out of the Act to Regulate Commerce, such jurisdiction is exclusive in the Fed-

eral Court, and the defendants may be sued wherever found.

If the jurisdiction is not based upon the federal question, then it rests only upon the fact of diversity of citizenship, and the defendants may be sued in the district whereof the complainants are inhabitants.

The fact that the jurisdiction may rest upon either ground in the absence of the other, can not defeat the jurisdiction when both grounds concur.

The presence of a federal question over which State Courts have concurrent jurisdiction will defeat the jurisdiction which would otherwise attach because of the diversity of citizenship; but the exclusive jurisdiction over the federal question arising out of the Act to Regulate Commerce can not be affected by the fact that diversity of citizenship also exists.

In view of the decision of the Circuit Court of Appeals in this case, we shall argue the proposition upon the assumption that a federal question, involving the construction of the Interstate Commerce Act, is presented.

The administration of the special remedies provided in the act is committed exclusively to the Federal Courts. The leading case in support of this jurisdiction is found in Van Patten v. Chicago, etc., R. Co., 74 Fed. 981. In that case the plaintiff sought to recover damages against the defendant railway company under the provision of the Interstate Commerce Act for alleged unreasonable charges, suit being brought in Iowa and the the defendant being a citizen and inhabitant of Wisconsin. In that case the same question of jurisdiction over the person of the defendant was presented as in this case. The Court held that for the enforcement of the remedies pro-

vided in the act the Federal Courts were vested with exclusive jurisdiction; and that where exclusive jurisdiction is created and conferred upon the courts of the United States by special acts of Congress passed prior to the enactment of the Judiciary Act of 1887-8 (as was the Act to Regulate Commerce), the jurisdiction that was conferred is not affected by those acts limiting the place of bringing suit to the district whereof the defendant is an inhabitant; such remedies being applicable only to cases in which the State and Federal Courts have concurrent jurisdiction.

It will be observed that the conclusion of the Court is largely based upon the fact that it was not the intent of Congress by the Judiciary Act of March 3rd, 1887, to interfere with any of the rights or remedies provided in the Interstate Commerce Act of February 4th, 1887; and that for the enforcement of the rights created in the Act, resort must be had to the Act itself, or to the judiciary acts then in force. This decision is not limited to the remedy pointed out in Section 9 of the Act, but extends to all suits and proceedings founded upon rights created in the Act. The language of Section 9 was not necessary to confer jurisdiction on the Circuit Court, for that remedy existed, if at all, so soon as Congress declared the right of a shipper against unjust charges to be one of Federal cognizance; the right having been adopted into the Federal law, the jurisdiction of the Federal courts to enforce or protect it immediately attached in virtue of the Constitutional grant of power to the Judiciary. Art. III, Sec. 2, Constitution of the United States. The language of Section 9 was employed solely for the purpose of conferring jurisdiction over actions for damages upon the Commission, and in order to prevent concurrent actions before both the Commission and the Courts; it added nothing to the jurisdiction of the Circuit Courts. In naming the Circuit and District Courts of the United

States, instead of using the words "any court of competent jurisdiction," Congress merely emphasized its intent not to confer jurisdiction on the State Courts. Excepting for the purpose of conferring jurisdiction on the Commission and of preventing concurrent actions, Section 9 might have been wholly omitted without affecting any remedy of the shipper. The mere failure to provide in express terms that the Circuit Court might enjoin threatened violations of the Act, can not be construed as a limitation upon the inherent equitable powers of the Court.

That the inhibition of Section 1 of the judiciary Acts of 1887-8 does not apply in cases where the courts of the United States have exclusive jurisdiction by special acts of Congress, is thoroughly established.

United States v. Mooney, 116 U. S. 106.
Atkins v. Disintegrating Co., 18 Wall. 272.
In re Louisville Underwriters, 134 U. S. 488, 493.
In re Hohorst, 150 U. S. 653, 662.
United States v. Standard Oil Co. (C. C. A.), 152 Fed. 290.

The precise question involved in this case has been decided by the Circuit Court of Appeals for the Ninth Circuit in the case of Northern Pacific R. Co. v. Pacific Coast L. M. Co., 165 Fed. 1. The facts in the Pacific Coast case are parallel with those in the case at bar, while the legal questions presented are identical.

The complainants in the Pacific Coast case, who were shippers of lumber from the State of Washington, filed their bill against certain trans-continental carriers to enjoin a proposed advance in the rates on lumber and forest products to destinations in other States. It was alleged that the proposed advance was unjust, unreasonable and excessive, and was the outcome of an illegal combination among the

carriers in restraint of interstate trade, in violation of the Act to Regulate Commerce and of the Sherman Anti-Trust Act. Before the advance became effective a rule to show cause was issued, in response to which the several defendants appeared specially and pleaded to the jurisdiction on the ground that each of the defendants was an inhabitant and citizen of a State other than Washington, and, therefore, not subject to be sued in the Western District of Washington on a cause of action involving a federal question. After argument of counsel on the objections to the jurisdiction, the Court, Judges Hanford and Wolverton presiding, announced that for the purpose of that hearing the Court would entertain jurisdiction. The hearing then proceeded, counsel for the defendants participating therein as amici curiae, and raising the objection that the Court was without jurisdiction over the subject matter, for that the right and power to pass upon the reasonableness and justness of rates was vested solely in the Interstate Commerce Commission.

The injunction prayed for was granted by the Court. Formal pleas to the jurisdiction over the persons of the defendants were filed and were subsequently argued and overruled. From the orders granting the injunction and overruling the pleas to the jurisdiction, the defendant railway companies took an appeal.

In the Circuit Court of Appeals the case was heard by the three Circuit Judges. After holding the case under advisement for nearly eight months, the Court, on October 5, 1908 (Judge Ross dissenting), handed down an elaborate and well considered opinion, fully sustaining the jurisdiction of the Circuit Court, both over the persons of the defendants and over the subject matter of the suit. In discussing the provisions of the Judiciary Act of 1887-1888, that no civil suit shall be brought before either the Circuit or District

Court "against any person by any original proceeding in any other district than that whereof he is an inhabitant," the Court said:

> "The Interstate Commerce Commission Act was passed at a time when the Judiciary Act of 1875 was in force. Under that Act a cause cognizable in the Federal Courts could be brought against a defendant in any district wherein he might be found at the time of serving process. The Acts of 1887 and 1888 being limited to actions over which there is concurrent jurisdiction in State Courts, do not apply to an action in which the federal jurisdiction is exclusive. (Citing authorities.) We have to enquire, therefore, whether the present suit is of a class of cases of which the State Courts would have concurrent jurisdiction."

The Court declared that the case presented a federal question, and continued:

> "It seems clear also that the jurisdiction of the Federal Courts over such a case must be exclusive. It is true that the remedy here sought is not one of those which are expressly provided for by the terms of the Act. The Act makes special provision for but two remedies, an appeal to the Interstate Commerce Commission and an action at law to recover damages for violation of the provisions of the Act, which action, it is declared, shall be brought 'in any District or Circuit Court of competent jurisdiction.' That the Federal Courts have exclusive jurisdiction of such actions has been held in Van Patten v. Chicago M. & St. P. R. Co., 74 Fed. 981, and Sheldon v. Wabash R. Co., 105 Fed. 735. . . . . Prior to the adoption of the Interstate Commerce Act, the State Courts had no jurisdiction over interstate rates, for the fundamental rea-

son that no State had the power through any department of its government to regulate commerce with other States. The only courts named in the Act to which recourse may be had in actions at law to recover damages are the District and Circuit Courts of the United States. It must have been the intention of the Act to give to those courts exclusive jurisdiction of all cases arising under it. 'It is manifest,' said Justice Story, 'that the judicial power of the United States is, unavoidably, in some cases, exclusive of all State authority, and in all others, may be made so at the election of Congress.' Martin v. Hunter, 1 Wheat. 304, 337."

This is the first and only case in which an Appellate Court has considered and decided whether the Circuit Court of the United States has exclusive jurisdiction over a suit in equity to protect the right to just and reasonable rates declared in the Act to Regulate Commerce. The Circuit Courts of Appeals in the case at bar did not decided this question, although Judge McCormick apparently thought the jurisdiction could not be maintained, while Judge Pardee doubted the jurisdiction of the Court over the persons of the defendants.

In this state of the decision, and in the absence of a cross appeal, it is doubtful if this Court will consider the question of jurisdiction over the persons of the defendants.

In the great case of Martin v. Hunter, 1 Wheat. 304, Mr. Justice Story showed that it was only in those cases in which State Courts had jurisdiction prior to the Constitution, that concurrent jurisdiction can now be exercised; and that in other cases of federal cognizance the jurisdiction of the Federal Court was necessarily exclusive, as Congress could not extend the jurisdiction of State Courts, since the

Constitution required that the judicial power of the United States should be vested in one Supreme Court and such inferior courts as Congress should establish.

In the eighty-second number of the Federalist, Alexander Hamilton, after showing that exclusive delegation of authority to the Federal Government arises only in one of three ways; either by express grant of exclusive authority over a particular subject; or by a simple grant of authority, with subsequent prohibition thereof to the States; or, lastly, where an authority granted to the Union would be utterly incompatible with a similar authority in the States; says that these principles may also apply to the judiciary as well as to the legislative power. This declaration of Hamilton is referred to and adopted by the Supreme Court in Claflin v. Houseman, 93 U. S. 130, wherein it is affirmed that exclusive jurisdiction is implied in the Federal Courts, where its exercise by State Courts would be incompatible.

The exercise of jurisdiction by State Courts over interstate and foreign commerce would be so clearly incompatible with the exclusive authority of Congress over the subject, that its existence is necessarily negatived. According to the argument of Hamilton, exclusive authority in Congress over the subject implies exclusive jurisdiction in the Federal Courts over the subject matter.

While it is true that Section 1 of the Act to Regulate Commerce is an adoption of the common law principle into the Federal law, it is also true that prior to the adoption of the Act, State Courts had no jurisdiction over interstate and foreign commerce. In so far as commerce is concerned, the several States are as foreign to each other as if they constituted separate and independent sovereignties. It would seem to necessarily follow that no one State could deter-

mine controversies relating to the service of transportation to be performed in another State.

It has been conclusively settled by the Abilene case that State courts have no jurisdiction over actions for damages for excessive charges in the matter of interstate shipments. Since, therefore, State courts are without jurisdiction to afford legal redress, it follows that they are equally without power to grant equitable relief. This is not true with respect to federal courts. While the reasoning in the Abilene case may be effective to deny jurisdiction in the first instance to the federal court in the matter of an action for damages for unreasonable charges, this jurisdiction is not abrogated, but its exercise is merely postponed. Should an order for reparation be obtained from the Interstate Commerce Commission it must be enforced in the Federal Courts, so that at last this jurisdiction in those courts is preserved. Upon familiar reasoning the federal courts, being competent to give legal redress for the wrong, may prevent its commission in proper cases.

The underlying reason assigned in the Abilene case against the jurisdiction of State Courts is that different conclusions concerning the reasonableness of the through rate may be reached by different courts and juries in different jurisdictions; so that the same interstate rate may be held to be lawful in one State and unlawful in another. Thus the through rate would be destroyed, and the orderly exercise of the powers of the Interstate Commerce Commission would be defeated. This reasoning applies with equal force against the jurisdiction of State courts to grant injunctions. Varying and conflicting conclusions may be arrived at by the courts of the different States with respect to the reasonable value of the transportation service to be performed within the particular State; and thus the effective regulation of interstate commerce by federal authority would be destroyed.

This result would not follow the granting of an injunction by a federal court having jurisdiction over the subject and the parties. The federal tribunals constitute one co-ordinate system acknowledging allegiance to the same sovereignty and administering the same laws under one Supreme Court. The subject of the suit is purely one of interstate commerce, over which the federal courts have exclusive jurisdiction under the legislation of Congress. The question concerns the reasonableness of the rate in its entirety; and by the system of auxiliary and ancillary proceedings the judgment of the Federal Court of primary jurisdiction will be respected and enforced in all other federal courts. When a federal circuit court grants an injunction in such cases, the subject of the injunction is the entire through rate, without regard to the States through whose territory the transportation may pass.

The cases of Galveston, etc., R. Co. v. Gonzales, 151 U. S. 496; In re Keasby & Mattison Co., 160 U. S. 221; Shaw v. Mining Co., 145 U. S. 448; Southern Pacific Co. v. Denton, 146 U. S. 202; and Wolff v. Choctaw, etc., Co., 133 Fed. 601, cited by the learned counsel in the court below, are none of them in point. In each of these cases the cause of action was one over which the State courts had concurrent jurisdiction; and they are all directed to the point that a corporation is, within the meaning of the Judiciary Act, an inhabitant only of the district and State of its incorporation—a proposition that we do not controvert. This distinction, which applies to all of the cases cited, is pointed out by the Court in the Pacific Coast case in reference to the Keasby case:

> "The appellants rely on In re Keasby & Mattison Co., 160 U. S. 221, to sustain their contention that the provisions of the Acts of 1887-1888 limiting the place of suit to the district whereof the defendants are inhabitants, is applicable

to the present case. But in that case those provisions were held to be applicable for the reason that the jurisdiction of the Federal Courts in that class of cases was concurrent and not exclusive."

"The decision was expressly based upon the ground that the Act did not assume to take away or impair the jurisdiction which the courts of the several States always had over suits for infringement of trade marks."

Northern Pac. R. Co. v. Pac. Coast L. M. Co., 165 Fed. 1, 10, 11.

The case of Sunderland Bros. v. Chicago, etc., R. Co., 158 Fed. 877, is not authority against the exclusive jurisdiction of the federal courts in this class of cases, for that the precise question was neither presented, considered, nor decided. It seems to have been conceded in that case that if the jurisdiction was attributable to the existence of a federal question, the court would be without jurisdiction over the persons of the non-resident defendants; and the courts so held, without discussion of the point.

In the case of Memphis Cotton Oil Co. v. Illinois Cent. R. Co., 164 Fed. 290, District Judge McCall thought the question was ruled by the Keasby case, rather than by the Van Patter case. In this we submit he was mistaken; and we further submit that the reasoning of the case does not sustain the conclusion reached.

The requirement that each defendant carrier must be sued only in the district of its inhabitancy, would destroy the efficient exercise of the judicial power in such cases. As we have seen, the whole of the judicial power of the United States has been vested by the Constitution in the Courts, and Congress is impotent to negative or defeat the exercise of this power by any limitation not found in the Constitution.

Kansas v. Colorado, 206 U. S. 46, 82-83.

If that provision of the judiciary act of 1887-8 that no civil suit founded upon a federal question shall be brought against any person in a district other than that whereof he is an inhabitant, should be held applicable to the case at bar, substantial justice would be defeated and the exercise of the judicial power in effect denied. Under the requirement as stated, it would be necessary that suit be brought against each defendant (appellee) in different states upon an identical cause of action resting upon the same facts and arising out of the same joint transaction. Such suits brought separately against the Nashville, Chattanooga & St. Louis Railway in Tennessee; Louisville & Nashville Railroad Company in Kentucky; Cincinnati, New Orleans & Texas Pacific Railway Company in Ohio; the Southern Railway Company and the Atlantic Coast Line Railroad Company in Virginia, would involve a multiplicity of suits, which equity abhors, and offend the doctrine that "Equity loves to do complete justice and not by halves."

This presents a cogent reason why the jurisdiction of the federal courts should be held to be exclusive in this class of cases; and that the act of March 3rd, 1875, which does distribute the whole judicial power among the inferior courts, should be construed to be applicable.

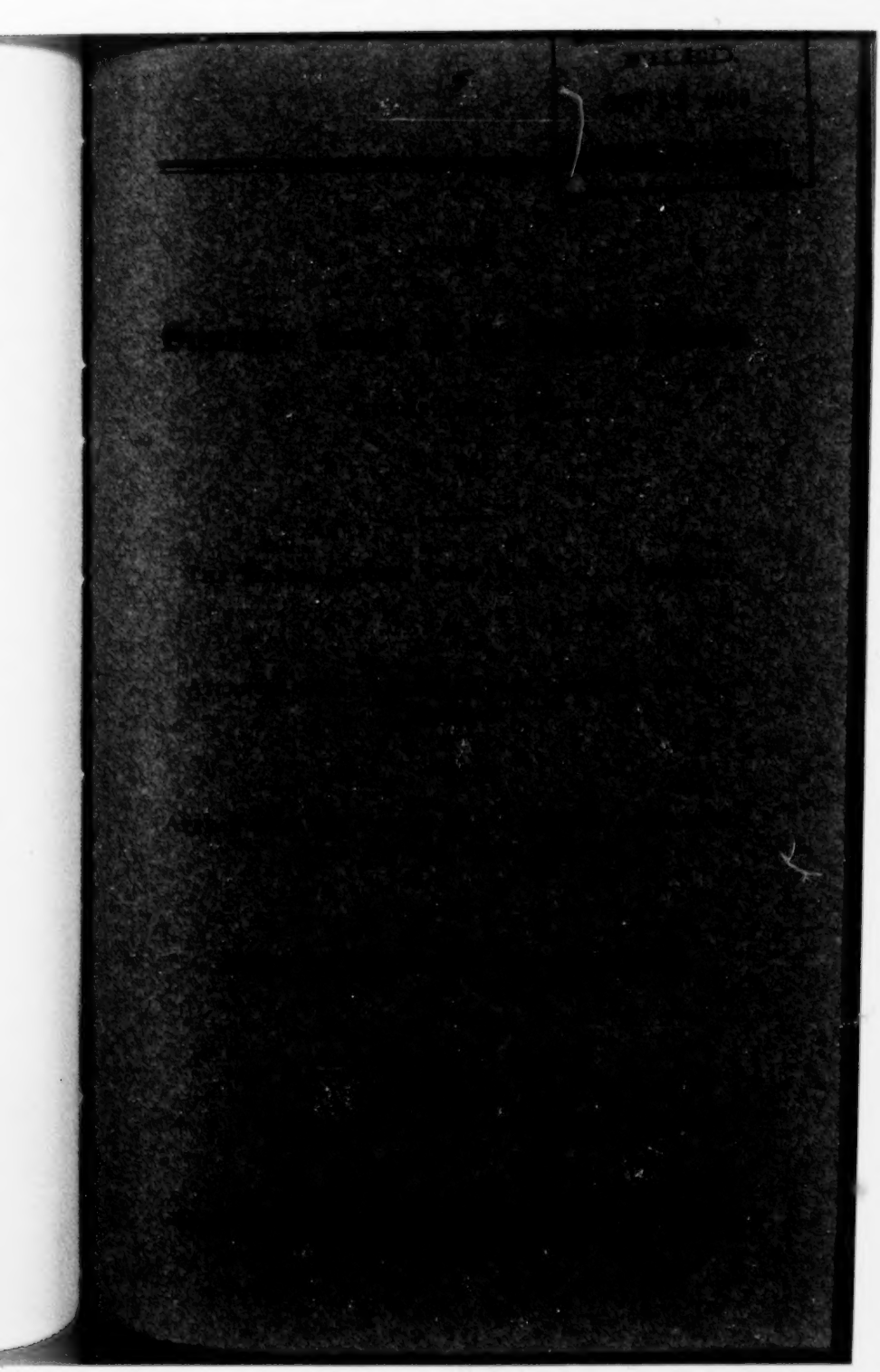
It is respectfully submitted that the order and decree of the Circuit Court of Appeals should be reversed.

WILLIAM A. WIMBISH,

Of Counsel for Appellants.

525 Prudential Building, Atlanta, Ga.

October 2, 1909.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 351.

THE MACON GROCERY COMPANY ET AL., *Appellants*,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF ARGUMENT FOR APPELLEES.

STATEMENT OF CASE.

On July 25, 1908, the appellants, consisting of the Macon Grocery Company and other domestic corporations of the State of Georgia, partnerships and individuals, having their principal places of business and domiciled in the Southern District of Georgia, and all alleging themselves to be citi-

zens of that State, engaged as wholesale dealers in groceries, food products and like commodities, presented to Hon. Emory Speer, United States District Judge for the Southern District of Georgia, at Mt. Airy, in the Northern District of Georgia, their bill of complaint against the appellees, the Atlantic Coast Line Railroad Company, a corporation and citizen of the State of Virginia; the Louisville & Nashville Railroad Company, a corporation and citizen of the State of Kentucky; the Nashville, Chattanooga & St. Louis Railway, a corporation and citizen of the State of Tennessee; the Southern Railway Company, a corporation and citizen of the State of Virginia; and the Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation and citizen of the State of Ohio, and applied for and obtained from said District Judge, without notice to appellees, a temporary restraining order whereby appellees were ordered to be and appear before said District Judge at the United States Court Room in the City of Atlanta, Georgia, on July 29, 1908, at 10 o'clock a. m., then and there to show cause, if any they could, why an injunction *pendente lite* should not be granted as prayed for in the bill; and, in the meantime, and until the further order of the Court, were thereby temporarily restrained from putting into effect the advance in freight rates referred to in the bill to be made effective August 1, 1908, in so far as all points within the State of Georgia were concerned. Notice of said hearing was directed to be given to appellees as speedily as might be by delivery of a copy of said order to any officer or traffic agent of each of the appellees.

Printed Transcript, p. 12.

Subsequently the place of this hearing was changed to Mt. Airy, Georgia, at the time fixed.

In their bill appellants allege, in substance, that appellees are common carriers by railroad engaged in the trans-

portation of interstate commerce, including grain, and grain products, hay, and meats, from Ohio and Mississippi River crossings, Nashville, Tennessee, and related points, to points in Southeastern territory, including the State of Georgia; that each of the appellees is a member of the Southeastern Freight Association which it is alleged was organized and is maintained under agreements and for purposes which constitute an illegal combination in restraint of interstate trade, and for fostering of monopoly in the destruction of fair competition among carriers engaged in such trade; that the appellees, Atlantic Coast Line Railroad Company and the Nashville, Chattanooga & St. Louis Railway form a part of the Louisville & Nashville Railroad System, and the appellee, Cincinnati, New Orleans & Texas Pacific Railway Company, forms a part of the Southern Railway System; that the said two systems have continuous lines from said crossings to southeastern destinations, and are natural competitors, so that any combination, agreement or understanding between them, whereby rates are advanced and maintained, is in suppression of competition; that during the year 1904 there was discontent with railroad rates on freight from both Eastern and Western points of origin to Atlanta, and related points, which included Macon and other cities in Georgia, and, after conferences in the latter part of that year were held, certain reductions were accorded by the railroad companies in the rates on Classes B, C, D and F, flour in sacks, and fresh meats, C. L., from said crossings to Atlanta and other points related, effective February 1, 1905, which rates as reduced were reasonable, and had been since maintained; that in June, 1908, a concerted movement was begun looking to an increase in the rates on said Classes and commodities from and to said points; that it was recognized that each of said two systems must unite in any such proposed increase, and to accomplish the purpose the intervention of said Association was sought and employed;

that a declaration was filed with said Association by the appellees, the Louisville & Nashville Railroad Company, Atlantic Coast Line Railroad Company and Southern Railway Company, composing said systems, announcing that on August 1, 1908, they would make effective certain advances in the rates, as set out in the bill, on Classes B, C, D and F, fresh meats, C. L., grain, grain products, hay, and packing house products from said crossings, Nashville, Tennessee, and points with relation thereto, to Southeastern points; that the Central of Georgia Railway Company (which is not sued) also joined in such declaration, which was communicated by the Chairman of said Association to each of the lines of railroad interested, in the form of a circular; that the concurrence of action on the part of said two systems suppressed competition and forced all connecting carriers either to concur in said advances or give up the traffic, and such connecting carriers did concur therein, acting through the agency of said Association; that subsequently the Louisville & Nashville Railroad System and the Southern Railway System filed with the Interstate Commerce Commission their freight tariffs embodying said advances, and gave notice that said tariffs would become effective on August 1, 1908; that in each of these tariffs practically every interested line joined as a participating carrier, a list of such participating lines, numbering seventy-three (73), including each of the appellees, being shown on page two (2) of said tariffs. The alleged method employed by the railway companies in advancing rates through the medium of said Association is set out in the bill; and it is further alleged in the bill that the territory of said Southeastern Freight Association may be roughly described as the States of South Carolina, Florida, Georgia, and that portion of Alabama east of a line drawn from Chattanooga through Birmingham, Selma and Montgomery to Pensacola; that the territory west of that line and east of the Mis-

sissippi River, embracing Mississippi and parts of Louisiana and Alabama, comes within the dominion of another like association called the Southeastern Mississippi Valley Association; that the States of Tennessee and Kentucky, including said crossings, are either embraced in the last mentioned Association or in some other association bearing a similar relation to the Southeastern Freight Association; that the territory north of the Ohio River and west of the Mississippi River is dominated by similar traffic associations; that the advance in rates complained of, effective August 1, 1908, was the outcome of understandings and agreements in suppression of competition and an unlawful combination in restraint of interstate trade, arrived at and made effective through the agency of the Southeastern Freight Association and other affiliated associations, and the acts of such combination in advancing rates was the result of a conspiracy which is unlawful at common law and under the Statutes of the United States; that the proposed advance was upon commodities of prime utility and daily necessity, and entitled to as low a rate as may be consistent with a fair return to the carrier for the transportation service performed; that said advance would disturb existing trade relations, causing loss to appellants and injury to the consuming public; that the commodities upon which the rates were to be advanced were of such necessity, and the supply from other sources was so limited, that considerable traffic would continue to move, even under the alleged exorbitant and unjust rates represented by the advance, but the effect of the increased rates would inevitably restrict the volume of the traffic, reduce the business of appellants and other dealers, and deprive the consuming public, or some part thereof, of the ability to purchase and use said commodities to the extent to which they are entitled, to the irreparable loss and injury of appellants and others similarly situated, and to the prejudice of the public interest; that appellants' legal remedy was inade-

quate for the loss and damage resulting to them from the exaction of unjust and unreasonable rates, and the consequent restriction of their business was a constantly recurring grievance incapable of pecuniary estimation, that should the advance be ascertained and declared to be unjust and unreasonable, and reparation be allowed, not only would such remedy be inadequate to compensate for the loss and damage suffered, but the enforcement of the right of reparation or of the right to threefold damages authorized under the Sherman Anti-Trust Act, would result in a multiplicity of suits; that under the reduced rates, effective February 1, 1905, traffic moved freely and the carriers prospered until the coming about of the abnormal conditions following the financial panic of October and November, 1907; that for some months thereafter the volume of railway traffic greatly declined, resulting in a loss to the carriers of both gross and net earnings; that this loss was attributable to a decrease in the volume of all traffic, but appellants believed it to be true that the decline in other traffic was much greater than in the commodities on which the proposed advance in rates applied; that not only were the carriers injuriously affected by the panic, but all lines and classes of business and industries also suffered loss; that the net earnings of appellees and other carriers in recent months had shown an advance, and there existed a reasonable expectation that net earnings would continue to increase and normal conditions would be restored; that the carriers had no right to take advantage of an abnormal condition, which in its nature was necessarily transitory, in order to make advances in rates upon commodities of utility and necessity, when the preceding rates had been shown to be compensatory under normal conditions.

Appellants further averred they were remediless under the strict rules of the common law, and could obtain relief only in a court of equity; and prayed for a rule against ap-

pellees to show cause why an injunction *pendente lite* should not be issued; that, in the meantime, appellees be temporarily restrained from putting into effect the proposed increase in rates to be made effective August 1, 1908, from said crossings and Nashville and related points to all points within the State of Georgia affected by said advance; and that, on final hearing, the Court enter a decree perpetuating such injunction.

Printed Transcript, pp. 2-11.

At the time and place of the hearing on the application for a temporary injunction each of the appellees in response to the rule to show cause, entered a special appearance for the purpose of pleading to the jurisdiction of said Court over the person of such appellee, and for no other purpose.

Printed Transcript, pp. 15-25.

Thereupon each of the appellees filed a plea to the jurisdiction of said Court, stating, in substance, that it was not at the institution of this suit, nor then, a corporation organized or existing under the laws of the State of Georgia, nor a citizen or inhabitant of that State, nor an inhabitant or resident of the Southern District of Georgia, but was at the institution of this suit, and was then, a corporation organized and existing under the laws of the State named in the bill, and a citizen of such State, and an inhabitant of a certain district therein, where its corporate meetings are held and its corporate business transacted; that this suit is a civil suit, wherein the jurisdiction is not founded only on the fact that the action is between citizens of different States, but is based also upon Acts of the Congress of the United States relating to interstate commerce, and alleged causes of action thereunder; and, in its said plea, each of the appellees insisted upon its exemption from suit in the circuit court for the Southern District of Georgia, and stated that

not that court, but the Circuit Court of the United States for the district in which it was an inhabitant, if any court, had jurisdiction of such appellee, and prayed hence to be dismissed.

Printed Transcript, pp. 15-25.

To each of these pleas appellants demurred, and for cause of demurrer averred that the controversy presented by the bill is wholly between citizens of different States, and is solely founded upon diversity of citizenship, and that the court had jurisdiction thereof.

Printed Transcript, pp. 159-160.

After oral argument the circuit court sustained appellants' said demurrers and overruled appellees' said pleas.

Printed Transcript, pp. 108-110.

Thereafter, appellees, without waiving their pleas to the jurisdiction of the Court over them or either of them, but still relying and insisting thereon, presented, as a further response to the rule to show cause, and filed their joint demurrer to the bill and for cause of demurrer, to show that the appellants had not in and by virtue of their bill made or stated any such cause of action as was within the jurisdiction of the circuit court, or as did or ought to entitle them to any relief in a court of equity, or to any relief as therein sought and prayed for, set forth and relied upon the following grounds:

> "I. It appears by the allegations of said bill of complaint this court had no jurisdiction of these defendants or either of them.
>
> "II. The facts stated in said bill of complaint show no cause of action of which the Circuit Court of the United States for the Southern District of Georgia has

jurisdiction in equity, and there is no equity in the said bill.

"III. It is not competent for any of the complainants or any individuals or individual having dealings with the railway companies to raise the question in the courts as to the rates of charge for interstate transportation described in the bill of complaint (the same having been established by law), without some representative of the public being a party to the record, or without the Interstate Commerce Commission having passed upon the said rates in the first instance, as provided by the Act to regulate commerce.

"IV. It appears from the allegations in the said bill of complaint that the complainants have not made or stated such cause of action as entitles them or either of them to the relief that is therein sought and prayed for, against these defendants or either of them in a Court of Equity of the United States.

"V. It does not appear from the allegations in said bill of complaint that the same is instituted or filed under or by authority of any Statute of the United States, and the same does not set forth facts showing that the complainants or either of them are entitled to maintain any bill of complaint in equity against these defendants or either of them under any law or Act of Congress of the United States.

"VI. It appears from and upon the face of the said bill of complaint that the said complainants have each an adequate and complete remedy at law, for the several alleged wrongs, in said bill of complaint set up against these defendants and each of them.

"VII. It appears from and upon the face of said bill of complaint that the Interstate Commerce Commission under and by virtue of the provisions of "An Act to Regulate Commerce," approved February 4, 1887, and the Amendments thereto, has original and exclusive jurisdiction of the matters and things set up and complained of in said bill of complaint, except those mentioned in the next paragraph of this demurrer.

"VIII. It appears by the allegations of the said bill of complaint and upon the face thereof that, in so far

as the same is brought to restrain and enjoin an alleged contract, combination, or conspiracy by or between the defendants, alleged to be in restraint of trade or commerce, among the several States, or alleged to have been made by or between the defendants to monopolize or as an attempt on their part to monopolize any such trade or commerce, to any extent, in alleged contravention of 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, commonly known as the Sherman Anti-Trust Act, neither the complainants or either of them, nor any other individuals or corporations, have any cause of action or right to institute or maintain any action to obtain any relief in equity, or in any Court of Equity, such right of action being vested exclusively in the United States, to be instituted by the several District Attorneys of the United States, in their respective districts, under the direction of the Attorney-General, and not otherwise, and all individuals and corporations are restricted to their remedies at law as provided in said Act.

"IX. The allegations in the said bill of complaint do not show that the complainants or either of them are entitled to institute or maintain this action against these defendants or either of them under or by virtue of an 'Act to Regulate Commerce,' approved February 4, 1887, and the Amendments thereto.

"X. The granting of the injunction sought and prayed for in said bill of complaint would be in effect to fix, at existing or prevailing maximum rates, the rates to be charged by defendants and each of them on August 1, 1908, and thereafter upon the classes of freight and commodities from and to the points stated in the said bill of complaint, thus usurping the power and right committed to the defendant carriers to fix and publish schedules and tariffs of their rates upon such classes and commodities from and to the points aforesaid and file the same with the Interstate Commerce Commission in the manner provided by said 'Act to Regulate Commerce,' and the Amendments thereto, subject to the power of said Commission, on a com-

plaint made, after full hearing, as therein provided, to prescribe what will be just and reasonable rates to be thereafter observed in such case or for like services, as the maximum to be charged, should said Commission be of opinion the rates or charges complained of are unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial, otherwise in violation of any of the provisions of the said Act or the Amendments thereto, and to award against the offending carriers or carrier reparation in damages to the complainant or complainants for such violation as provided in such Act as amended; and to grant the relief as prayed for by complainants would be the exercise by this Court of legislative, and not judicial, power, and to pass such a decree is and would be beyond the power, authority, and jurisdiction of this Court."

Printed Transcript, pp. 22-24.

The circuit court disregarded this demurrer and evidently held it to be (although without expressly so deciding) insufficient as a response to the rule to show cause why the temporary injunction should not be granted, and forthwith proceeded to hear the application therefor, and the affidavits and documents offered by the appellants in support thereof, which constitute the bulk of the transcript of the record on this appeal.

Printed Transcript, pp. 27-107.

Appellees offered no counter-affidavits or evidence on appellants' application for a temporary injunction, relying at said hearing, as they do now, on this appeal, alone upon the questions of law involved, as presented by the bill, pleas and demurrer aforesaid, as sufficient to show said application should have been refused instead of granted as it was by the circuit court.

Printed Transcript, pp. 131-132.

On August 5, 1908, appellees presented their petition

for appeal from said interlocutory decree, and application for a stay, supersedeas and suspension of the injunction thereby granted, together with their assignment of errors, to Hon. Don A. Pardee, Circuit Judge and one of the Judges of the Circuit Court of Appeals for the Fifth Circuit, who on that day entered an order allowing the appeal.

Printed Transcript, pp. 132-133.

On January 5, 1909, a decree was entered by the United States Circuit Court of Appeals for the Fifth Circuit reversing the decree of the said Circuit Court and remanding the cause to said Circuit Court with instructions to dismiss the bill without prejudice.

Printed Transcript, p. 185.

From this decree of the Circuit Court of Appeals for the Fifth Circuit an appeal to this court was prayed by appellants (Complainants in the Circuit Court) and the appeal allowed.

Printed Transcript, pp. 186-187.

BRIEF OF ARGUMENT.

I.

The main positions of appellees are:

The Circuit Court had no jurisdiction of their persons, because a federal question is involved, and suit must be brought against appellees in the district of their inhabitancy.

The Circuit Court had no jurisdiction of the subject matter because the suit is brought prior to any action by the Interstate Commerce Commission on the rates sought to be enjoined.

The Bill cannot be sustained under the Anti-Trust Act because only the United States may bring suit for injunction under that statute. No private individual has any right to do so.

There is no equity in the Bill. One trader cannot be compelled to so conduct his business as to insure profit to another trader. The functions of Government are completely fulfilled in preventing extortion by the fixing of maximum rates which must not be confiscatory, and in providing machinery to prevent undue discrimination.

It is not a function of Government through any of its departments to become the general manager of the business either of railroads or shippers.

II.

NO JURISDICTION OF THE PERSONS.

Judgment of Circuit Court of Appeals Final in Suit Based Solely on Diversity of Citizenship.

Appellants filed the following demurrer to the special pleas, made applicable by stipulation to all appellees:

> "Now come the complainants in the above-entitled cause, by protestation, et cetera, and demur to the plea to the jurisdiction, filed herein by the defendant, Louisville & Nashville Railroad Company, and for cause of demurrer show: That the controversy presented by the bill is wholly between citizens of different States, and is solely founded upon diversity of citizenship; and that the court has jurisdiction thereof.
>
> WIMBISH, WATKINS & ELLIS,
> ALEXANDER AKERMAN,
> *Solicitors for Complainants.*"
>
> Printed Transcript, p. 160.

This appeal will not lie and must be dismissed if appellants are right in this demurrer.

This court says:

> "The first question is whether this court can entertain jurisdiction of this writ of error, and this must be answered in the negative if the ground on which the jurisdiction of the circuit court was invoked was 'dependent entirely upon the opposite parties to the suit or controversy being * * * citizens of different States,' because in such case the judgment of the circuit court of appeals was final. Act of March 3, 1891 (26 Stat. at L., 828, Chap. 517, Sec. 6, U. S. Comp. Stat. 1901, p. 550)."
>
> Cochran vs. County of Montgomery, 199 U. S., 260, 267.

III.

NO JURISDICTION OF THE PERSONS (Continued).

The Bill Involves Federal Questions.

But Federal questions are involved and plainly appear on the face of the bill.

An examination of the averments contained in the bill discloses this.

1. All five of the appellee railway companies are alleged to be "common carriers engaged in the transportation of commodities and articles of interstate commerce, including the transportation of grain, flour, grain products, hay and meats from Ohio and Mississippi River Crossings, Nashville, Tenn., and points made with relation thereto, the southeastern points of destination," thus showing they are subject to the Act to regulate commerce.

Par. III, Printed Transcript, p. 3.

2. The appellees are described as members of the Southeastern Freight Association, and it is averred that said "Association was organized and is maintained under agreement and for purposes which constitute an illegal combination in restraint of interstate trade, and for the fostering of monopoly in destruction of fair competition among carriers engaged in interstate trade," thus attempting to bring said association and its members within the provisions of the said Anti-Trust Act.

Par. III, Printed Transcript, pp. 3-4.

3. The Southern Railway system and the Louisville & Nashville Railroad system are alleged to be "naturally competitors, so that any combination, agreement or understanding between them, whereby rates are advanced and maintained, is in suppression of competition," again having reference to the last mentioned Act.

Par. IV, Printed Transcript, p. 4.

4. Again appellants submit "that this concurrence of action on the part of the two systems of railways effectively suppressed competition. * * * Subsequently the Louisville & Nashville system filed with the Interstate Commerce Commission its freight tariff, embodying the advances in rates above mentioned, and gave notice that said tariff would become effective on August 1, 1908; and the Southern Railway system likewise filed with the Interstate Commerce Commission its freight tariff setting out the identical advances in rates to become effective on the same day, to-wit, August 1, 1908. In each of these tariffs practically every interested line joined as a participating carrier, a list of such participating lines, numbering seventy-three, including each of the defendants hereto, being shown on page 2 of the tariff," showing plainly the advance in freight rates sought to be enjoined had been published and filed in accordance with the Act to Regulate Commerce.

Par. VI, Printed Transcript, p. 6.

5. After alleging the method employed by the railways to advance rates through the medium of said Association, and referring to other similar associations, appellees charge that they are "all potent through their constituent members in fixing and maintaining freight rates, and in suppressing competition and restraining interstate trade.

"Your orators distinctly charge that the advance in the rates complained of, effective August 1, 1908, was and is the direct outcome of understandings and agreements in suppression of competition, and an unlawful combination in restraint of interstate trade arrived at and made effective through the agency of the Southeastern Freight Association and other affiliated freight associations; and that the acts of such combinations in advancing rates is the result of a conspiracy which is *unlawful*, as well at common law

as *under the statutes of the United States,*" thereby expressly relying on the provisions of said Act of Congress.

Par. VIII, Printed Transcript, pp. 7-8.

The foregoing allegations raise Federal questions. All the courts have so held on similar bills.

In Tift vs. Southern Railway Company et al., 123 Fed., 789, a bill was filed in the Circuit Court for the Southern District of Georgia to enjoin alleged unreasonable rates.

A demurrer to the jurisdiction was interposed by defendants on the ground that the requisite diversity of citizenship was lacking, for the reason that all of the complainants and all of the defendants were not citizens of different States, but on the contrary some of the defendants, for example, the Central of Georgia Railway Company, and some of the plaintiffs, for example, H. H. Tift, were citizens of the same State, that is to say, the State of Georgia.

To meet this demurrer the same counsel who represent appellants here, argued that the Tift case rested on a Federal question making diversity of citizenship unnecessary.

Whereupon the same learned judge who issued the decree in the instant case expressly held that the jurisdiction to enjoin the unreasonable rates complained of in the Tift case was based upon the fact that the subject matter of the suit was a right asserted under the act of Congress known as the "Interstate Commerce Act" with its amendments.

He thus states his conclusions:

> "Then it is clear that the court of the United States has jurisdiction, as such, of this question arising under the Constitution and laws of the United States."
>
> Tift vs. Southern Ry Co. et al., 123 Fed., 789, 793.

In Northern Pacific Ry. Company vs. Pacific Coast, etc.,

Assn., 165 Fed., 1, a bill similar to that in the case at bar was filed by the same counsel who represent appellants here.

Referring to the bill in that case the Circuit Court of Appeals for the Ninth Circuit says:

> "The case is clearly one which presents a Federal question. It arises under the Constitution and laws of the United States. Its purpose is to compel compliance with the provisions of the Interstate Commerce Act, and its correct decision depends upon the construction of that act. In re Lennon, 166 U. S., 548, 17 Sup. Ct., 658, 41 L. Ed., 1110; Toledo, A. A. & M. Ry. Co. vs. Pennsylvania Co. (C. C.), 54 Fed., 730, 19 L. R. A., 387."
>
> Nor. Pac. Ry. Co. vs. Pacific, etc., Assn., 165 Fed., 1, 9.

In the Pacific coast case motions were made to dismiss for lack of jurisdiction.

Judge Hanford says:

> "Jurisdiction cannot be maintained on the ground of diversity of citizenship, because the complainants are not all citizens nor inhabitants of the State of Washington, and all of the defendants have their legal domiciles in States other than the State of Washington. Smith vs. Lyon, 133 U. S., 315, 10 Sup. Ct., 303, 33 L. Ed., 635; Shaw vs. Quincy Mining Co., 145 U. S., 444, 12 Sup. Ct., 935, 36 L. Ed., 768. It is the opinion of the court, however, that the jurisdiction rests firmly and safely upon the ground that the suit is one arising under the laws of the United States, and that the restrictive clauses of the statute defining the jurisdiction of the United States Circuit Court are not applicable. This is so because the bill of complaint by positive and specific averments accuses the defendants of having entered into a combination to suppress competition in violation of the Act of Congress commonly

referred to as the 'Sherman Anti-Trust Law,' the fourth section of which provides. * * *"
Id., p. 12.

In the case of Memphis Cotton Oil Company vs. Illinois Central Railroad Company, 164 Fed., 290, a similar bill was filed, and it was held that a Federal question was involved. Judge McCall said:

"The suit is one arising under the laws of the United States, viz.: Interstate Commerce Act February 4, 1887, C. 104, 24 Stat., 379 (U. S. Comp. St., 1901, p. 3154), as subsequently amended."
Memphis Cotton Oil Co. vs. I. C. R. R., 164 Fed., 290, 292.

A similar bill was filed in the Circuit Court for the Southern District of West Virginia, and it was held by Judge Keller that it involved a construction of the Act to Regulate Commerce, and the suit not being founded solely on diversity of citizenship, could not be sustained in a district of which the defendant was not an inhabitant unless such objection is waived.

Imperial Colliery Co. vs. C. & O. Ry.
Powhatan Coal Co. vs. N. & W. Ry.
Pamphlet of Unpublished Opinions, since reported, 171 Fed., 589.

In the case at bar the Circuit Court of Appeals for the Fifth Circuit says:

"We conclude that the bill in this case presents for necessary consideration the proper construction of the act to regulate commerce, and, therefore, the jurisdiction of the court does not rest solely upon the diversity of the citizenship of the parties."
A. C. L. R. R. Co. et al. vs. Macon Grocery Co. et al., 166 Fed., 206, 218-219.
Printed Transcript, p. 182.

There is no dissent by Judge Shelby on this proposition.

It is also worthy of note that the Circuit Judge in the case at bar admits that a Federal question is involved.

He says:

> "It is true that in this case the illegality of the alleged increase in rates must necessarily in large measure be determined by the Federal law. The legality or illegality of the alleged combination in restraint of trade must be determined by the same law, and it seems to be conceded that, generally speaking, this court would not have jurisdiction of these questions *finally* except under conditions which do not exist here. That is to say, the court can only for *final* determination entertain the Federal question *in the district of which the defendants are inhabitants.*" (Italics ours.)
>
> Printed Transcript, p. 108.

In passing we venture to say that it seems to us a novel doctrine that any court can entertain jurisdiction over the persons of the defendants for temporary purposes, or in order to enter an interlocutory decree against the defendants while at the same time conceding it has no jurisdiction to enter a final decree determining the rights of the parties.

Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege or claim or protection or defense of the party in whole or in part by whom they are asserted.

> Tennessee vs. Davis, 100 U. S., 257.
>
> New Orleans, etc., R. Co., vs. Mississippi, 102 U. S., 135.
>
> Illinois vs. Ill. Central R. Co., 16 Fed., 881, 887.
>
> Leonhard vs. Shreveport, 28 Fed., 257.

It was said by Chief Justice Marshall in Cohens vs. Virginia, 6 Wheat., 264, 379, that "a case in law or equity con-

sists of the right of the one party as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either."

Tennessee vs. Davis, 100 U. S., 257.
Patton vs. Brady, 184 U. S., 608.

Again in Osborn vs. Bank of the United States, 9 Wheat., 738, it was said a Federal question arises when "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction."

From all of which the conclusion is inevitable that Federal questions are involved in this suit.

IV.

NO JURISDICTION OF THE PERSONS (Continued).

Federal Questions Being Involved Suit Can be Brought Only in District of Inhabitancy of Appellees.

The present Judiciary Act provides that:

> "* * * no civil suit shall be brought before either of said Courts" (Circuit or District) "against any person by any original process or proceeding in any other District than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the District of the residence of either the plaintiff or the defendant."
>
> 25 Stat. L., 434; Fed. Stat. Anno., Vol. 4, Sec. 647, pages 265, 266.

Under this act, there are plainly three classes of cases, and no more:

1. The case where the action is instituted against a defendant neither in the District of the plaintiff nor the District of the defendant, and this is not permitted to be done under any circumstances or whatever the jurisdictional facts may be.

2. The case where the suit is brought either in the District of the plaintiff or the District of the defendant, and the plaintiff has his choice, where the sole jurisdictional fact is diversity of citizenship; and,

3. The case that is confined exclusively to the District of which the defendant is an inhabitant.

Here the suit must be brought in that District, and arises where the jurisdiction is not dependent only upon diverse citizenship, but is either dependent upon the fact that the controversy arises solely out of some law of the United States or out of such law coupled with diverse citizenship.

Now, into which of the three classes does the case at bar fall?

We have seen by the allegations of the bill that diverse citizenship is not the sole jurisdictional fact, but that the controversy arises out of an alleged violation of the Act of Congress of February 4, 1887, commonly known as the Interstate Commerce Act, and, in consequence, the plaintiff has no election to sue in his own district, over the objection of the defendant, but is confined by the very terms of the Judiciary Act to the district whereof the defendant is an inhabitant.

This position is sustained not only by persuasive, but by binding, authority. In Shaw vs. Quincy Mining Co., 145 U. S., 444, Mr. Justice Gray says, quoting McCormick, etc., Co. vs. Walthers, 134 U. S., 41, 43:

> "Where the jurisdiction is founded upon any of the causes mentioned in this Section, *except the citizenship of the parties*, it must be brought in the District of which the defendant is an inhabitant." (Italics ours.) 145 U. S., 444, 448-449.

The foregoing case arose and was decided under the Judiciary Act of March 3, 1887, as corrected by the Act of August 13, 1888; that is, under the present law.

In Galveston, etc., Ry. Co. vs. Gonzales, 151 U. S., 496, it was held that a domestic corporation incorporated under the laws of Texas, a State divided into more than one Federal District, is under the State law and the Federal laws as to the bringing of suits and actions in the Federal Courts, a citizen and inhabitant of that district in the State within which the general business of the corporation is done and where it has its headquarters and general offices; and that such corporation can not be said to be an inhabitant of the other federal district in the State, although it operates its

line of railroad through it and maintains freight and ticket offices and stations in it. In that case a citizen of the Republic of Mexico brought suit against the Galveston, etc., Railway Co. to recover damages for personal injuries. The defendant company appeared specially for the purpose of objecting to the jurisdiction of the court, claiming its exemption from suit in the Circuit Court of the United States for the Western District of Texas, and it was held by the court that an alien who desires to commence an action or bring a suit against a citizen of the United States must resort to the domicile of the defendant in order to bring it. In the course of the opinion in that case it was said with respect to the Judiciary Act:

> "It will be noticed that in this as well as in prior acts regulating the jurisdiction of the circuit courts a distinction is made between citizens of States and inhabitants of districts; this distinction has been carefully observed in all the principal adjudications upon the construction of these statutes."
> 151 U. S., 496, 500.

The court then refers to some of the cases on that subject, including that of Shaw vs. Quincy Mining Co., 145 U. S., 444, and Southern Pacific Co. vs. Denton, 146 U. S., 202, in which latter case it was held that a citizen of Texas and a resident of the Eastern District of that State could not maintain a suit in the Western District of that State against a railroad company incorporated under the laws of the State of Kentucky. Further on the court states:

> "These cases must be regarded as establishing the doctrine that a domestic corporation is both a citizen and an inhabitant of the State in which it is incorporated, but in none of them is there any intimation that where a State is divided into two districts a corporation shall be treated as an inhabitant of every district of such

State or of every district in which it does business, or, indeed, of any district other than that in which it has its headquarters or such offices as answer in the case of a corporation to the dwelling of an individual."

151 U. S., 496, 503-504.

Again the court states:

"There are doubtless reasons of convenience for saying that a corporation should be considered an inhabitant of every district in which it does business, and so the statutes of the several States generally provide, but the law contemplates that every person or corporation shall have but one domicile, and in the case of the latter, it shall be in that State by whose laws it was created and in that district where its general offices are located.

"This court having held in the cases heretofore referred to that a corporation can not be considered an inhabitant of any State in which it is not incorporated by reason of the fact that it does business, or, in the case of a railroad, that it runs its road through such State, it would seem inconsistent to hold that it is an inhabitant of a district by reason of the same facts, unless the distinction between citizenship and inhabitancy is to be wholly abolished."

151 U. S., 496, 506.

In re Keasbey & Mattison Co., 160 U. S., 221, the court held that by virtue of the Act of 1887 as corrected by the Act of 1888, a corporation incorporated by one of the States of the United States can not be compelled to answer to a suit for the infringement of a trade mark under the Act of March 3, 1881, in a district in which it is not incorporated, although it does business and has a general agent in that district.

In the opinion of Mr. Justice Gray in that case it was said with respect to the proviso in Section 1 of the Judiciary Act of 1887, as corrected by the Act of 1888:

"The last clause is added by way of proviso to the next preceding clause, which, in its present form, *forbids any suit* to be brought in any other district than that of which the defendant is an inhabitant and the effect is that in *every suit* between citizens of the United States, when the jurisdiction is founded upon *any* of the grounds mentioned in this section other than the citizenship of the parties, it *must* be brought in the district of which the defendant is an inhabitant, but when the jurisdiction is founded only on the fact that the parties are citizens of different States, the suit shall be brought in the district of which either party is an inhabitant and it is established by the decisions of this court that within the meaning of this Act a corporation can not be considered a citizen and inhabitant or a resident of a State in which it has not been incorporated; and, consequently, that a corporation incorporated in a State of the Union can not be compelled to answer to a civil suit at law or in equity in a Circuit Court of the United States held in another State, even if the corporation has a usual place of business in that State." (Italics ours.)

160 U. S., 221, 228-229.

See also *ex parte* Wisner, 203 U. S., 449.

In re Moore, 209 U. S., 490.

Western Loan Co. vs. Mining Co., 210 U. S., 366.

In A. L. Wolff & Co. vs. Choctaw, O. & G. R. Co., 133 Fed., 601, the plaintiffs were citizens of the State of Missouri and instituted their action to recover damages from two railroad companies, one of which objected to the jurisdiction of the court on the ground that it was a corporation created by an Act of Congress and as between it and the plaintiffs the jurisdiction of the Circuit Court of the United States for the Eastern District of Arkansas was not invoked by reason of the fact of diverse citizenship alone, but that the cause of action arose under the laws of the United States, and the question for the court was whether such a corporation could be sued in a national court of a

district other than that of which it was an inhabitant, and it was held that the suit could not be maintained against that company. In the course of the opinion it was said (p. 604):

> "The fact that Congress by the Act of 1887 made special provision for actions in which the jurisdiction depends only on a diversity of citizenship, permitting them to be maintained in the district of the residence of the plaintiff or defendant, but made no such provision for actions in which the jurisdiction depends upon other grounds, clearly indicates that it did not intend to permit a party to be sued in a national court in any district other than that where he resides, except where the jurisdiction is invoked upon the sole ground of a diversity of citizenship."
>
> 133 Fed., 601, 604.

In Sunderland Brothers vs. Chicago R. I., & P. Ry. Co., 158 Fed., 877, decided by the Circuit Court in Nebraska, January 30, 1908, the action was by certain shippers to restrain an interstate carrier from enforcing a reconsignment charge of five dollars a car as unreasonable. The court found the suit to be one within the Interstate Commerce Act, so that Federal jurisdiction was not alone dependent on diverse citizenship, and accordingly held that suit could be brought only in the District of which the defendant was an inhabitant. Munger, District Judge, said, at page 881:

> "We think that the jurisdiction of this court is not based alone upon diverse citizenship, but also upon the before cited Act of Congress and acts amendatory thereof.
>
> "It therefore follows that this Court has no jurisdiction, and that the restraining order heretofore granted must be vacated and the bill dismissed."
>
> 158 Fed., 877, 881.

In Memphis Cotton Oil Co. vs. Ill. Cent. R. Co., 164 Fed.,

290, a decision of the Circuit Court in Tennessee rendered September 29, 1908, the same point was ruled, and McCall, District Judge, said, at page 291:

> "It is clear from the last paragraph that no suit shall be brought in either of the United States Courts against any person by any original process in any other district than that whereof he is an inhabitant, except where the jurisdiction is founded only on the fact that the action is between citizens of different States."
> 164 Fed., 290, 291.

To the same effect see Imperial Colliery Co. vs. Norfolk & Western Railway Company, and Powhatan Coal & Coke Co. vs. Norfolk & Western Railway Company.

Pamphlet Unpublished Opinions, since reported, 171 Fed., 589.

It is true that Judge Gilbert, in the case of Northern Pacific Ry. Co., vs. Pacific Coast Lumber Manufacturers' Association, 165 Fed., 1, reached a different conclusion; but, as will appear from his opinion, the judgment of the Court was based upon the mistaken notion that there was a difference in the language between the Judiciary Act of 1875, and the Judiciary Act of 1887, as corrected by the Act of 1888, when, in fact, upon the point in question, they are identical. His conclusion is likewise squarely in the face of the Act of 1888 itself, and ignores the conclusion of the Supreme Court of the United States in the case of Shaw vs. Quincy Mining Company, 145 U. S., 444, as well as *In re* Keasbey & Mattison Company, 160 U. S., 221. It may be further suggested in this connection that the distinction attempted to be drawn by Judge Gilbert to the effect that the Acts of 1887 and 1888 relate only to cases whereof the State and Federal Courts have concurrent jurisdiction is without the slightest foundation in fact, and violative of the plain and peremptory language of those Acts.

V.

NO JURISDICTION OF THE PERSONS (Continued).

No Waiver of Exemption From Suit in District of Inhabitancy.

In the case at bar, as has already been noted, special appearances and special pleas to the jurisdiction were interposed on the ground that the suits were not brought in the district of inhabitancy of the defendants who are appellees in this court. Demurrers to the jurisdiction of the subject matter were only filed *after* said special pleas were overruled, and expressly without waiving the same, that is to say, demurrers to the jurisdiction over the subject matter were filed upon compulsion.

Printed Transcript, p. 22.

There is, thus, no waiver.

All the cases and the proper practice to avoid waiver have been recently reviewed by this court in the cases of

In re Moore, 209 U. S., 490.

Western Loan Co. vs. Mining Co., 210 U. S., 366.

The procedure adopted in the instant case is in conformity with the proper practice pointed out by this court to be pursued if exemption from suit in the wrong District is to be preserved.

In the Tift case no special appearances were entered and no special pleas were interposed for the purpose of raising the question that the suit was brought in the wrong district.

VI.

NO JURISDICTION OF THE PERSONS (Continued).

Suit Must be Brought in District of Inhabitancy Even Though Jurisdiction of Federal Court Exclusive.

We do not controvert the proposition that the Judiciary Act of 1887-8, limiting the institution of civil suits in the Circuit Courts of the United States to the district whereof the defendant is an inhabitant, does not apply where Congress, by a special act, has created and conferred exclusive jurisdiction over particular cases or classes of cases, upon the Circuit Courts of the United States, and has made special provisions for *venue*.

The question to be considered and determined here, however, is whether or not this suit of appellants comes within the purview of the provisions of either of the Federal acts referred to in the bill of complaint. In other words, has Congress by either of these special Acts, or any other Act, created or confered jurisdiction upon the Circuit Courts of the United States of a suit in equity brought by private persons or corporations to enjoin a common carrier by railroad from charging or collecting interstate rates which it has made, published and filed with the Interstate Commerce Commission, as required by law, *before* that Commission has, after full hearing upon complaint, condemned such rates as "unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial?"

If appellants are unable (as must be admitted by them) to point this court to the provision in any of the Federal Acts which creates and confers jurisdiction upon the Circuit Courts of the United States of this particular kind of suit, then necessarily the Judiciary Act of 1887-8 controls and requires such a suit as this to be brought in the district whereof the defendants are inhabitants, unless the exemp-

tion from suit elsewhere is waived. The record shows there was no such waiver in this case, but, on the contrary, the statutory exemption from suit in the Southern District of Georgia was expressly pleaded and relied on.

In the case cited by appellants, United States vs. Standard Oil Company, 152 Fed. 290, the United States exhibited its bill in equity in the Circuit Court of the United States for the Eastern District of Missouri against the Standard Oil Company, a corporation of New Jersey, seven individuals, and about seventy other defendants, called subsidiary corporations, two of which were corporations of Missouri, to enjoin them from continuing and maintaining an alleged conspiracy to restrain and monopolize commerce in petroleum and its products, among the several States and Territories and with foreign nations. That action was brought under the express provisions of Section 4 of the Anti-Trust Act of July 2, 1890. Section 5 of that Act is as follows (U. S. Com. Stats., Vol. 3, p. 3201):

> "Whenever it shall appear to the court before which any proceeding under section four of this Act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof."
>
> U. S. Comp. Stats., Vol. 3, p. 3201.

Of course, the court rightly held that the plea objecting to the jurisdiction over those defendants who were not inhabitants of the Eastern District of Missouri, where that suit in equity was brought by the United States, was unavailable, the special Act of Congress having taken such cases out from under the operation of the exemption from suit contained in the general Judiciary Act of 1887-8.

Appellants' counsel contend that if the case at bar involves a construction of the Anti-Trust Act or the granting of any relief therein provided, it comes within the authority of the case last referred to; and, if it does not involve a construction of that Act or the granting of any relief thereunder, the jurisdiction of the court below safely rests only on the fact of diversity of citizenship. But they overlook the fact that the Anti-Trust Act provides for a suit in equity in behalf of the United States alone, and hence the Standard Oil Company case relied on by them affords no authority whatever for the institution of this suit in equity by private parties, under the provisions of that Act, in a district whereof none of the defendants was an inhabitant.

We agree with appellants' counsel that the same reasoning applies to suits arising out of the Act to Regulate Commerce, and that the administration of the special remedies provided by that Act is committed exclusively to the Federal tribunals. But we insist that while that is true, the Federal tribunals must be applied to by suit in the manner, at the time, and under the circumstances prescribed in that Act, and not otherwise, or in a different manner, or at a different time, or under different circumstances. In other words, the system of regulating interstate commerce devised by Congress must be followed in all respects, and cannot be departed from in any particular. The scheme of regulation embodied in that Act is and was intended to be complete in itself and exclusive of all former or previously existing remedies at law or in equity of shippers, carriers, or others affected or interested in the interstate rates of common carriers by railroad.

The Act to Regulate Commerce and its amendments will be searched in vain to find a provision authorizing the institution by a shipper of a suit in equity in any Federal Court to enjoin a carrier from charging or collecting an

interstate rate *before* the Commission has decided such rate to be unjust or unreasonable, let alone a provision authorizing such an action to be instituted in a district whereof the defendant carrier is not an inhabitant.

VII.

NO JURISDICTION OF THE PERSONS (Continued).

Suit Must Be Brought in District of Inhabitancy Even Though Jurisdiction of Federal Court Exclusive (Continued.)

In both the Circuit Court and the Circuit Court of Appeals appellants took the position as stated in their briefs that "if the jurisdiction of the court is founded upon a Federal question it is exclusive and the defendants may be sued wherever found."

The same position will be pressed here and is raised by appellants' assignment of error number six.

Printed Transcript, p. 189.

It is argued by appellants that the exemption clause applies alone to that class of cases where the State and Federal courts have *concurrent* jurisdiction. They cite Van Patten vs. Chicago, M. & St. P. R. Co., 74 Fed., 981. The real question for decision in that case was whether the said clause in the Judiciary Act of 1887-8 applied to suits brought by shippers under Sections 8 and 9 of the Act to Regulate Commerce to recover damages for charges alleged to have been in excess of just and reasonable rates, and the court held that the Federal Courts had exclusive jurisdiction of such suits and that they might be brought in any district where the defendant carrier could be found. The reasoning of Judge Shiras in reaching this conclusion in that case that the exemption clause in question only applied to cases where the State and Federal Courts have *concurrent* jurisdiction is not at all satisfactory even to himself, as this court will find at the close of his opinion as follows (p. 989):

"*If* it be true that the right to sue for damages for overcharges, made in violation of the provisions of the Interstate Commerce Act, is created by Section 8 of that act, and exists wholly independent of the provisions of the judiciary act of 1887-1888; *if* it be true that the right of action created by Section 9 of the Interstate Commerce Act is exclusive in the Federal Court; *if* it be true that, if the judiciary acts of 1887-1888 had not been enacted, this court would have jurisdiction over this case under the provisions of the Interstate Commerce Act; and *if* it be true that the Supreme Court has declared the law to be that the provisions of Section 1 of the judiciary acts of 1887-1888 are confined to cases of concurrent State and Federal jurisdiction, and do not affect an existing exclusive jurisdiction in the Federal courts, created by other acts touching special subjects,—it must then be that the jurisdiction created and conferred by the Interstate Commerce Act over cases of the character of that now before the court is not affected by the acts of 1887-1888."

74 Fed., 981, 989.

We do not question the correctness of his decision that the Federal courts have exclusive jurisdiction of suits brought for the recovery of damages under the provisions of the Interstate Commerce Act. That is made clear by Section 16 of the Act, which expressly provides that after the Commission has found on complaint that a party is entitled to an award of damages and the carrier fails to pay the sum awarded, within the time fixed by the Commission, suit may be brought by such party "in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs."

The case of Sunderland Bros. vs. Chicago, R. I. & P. Ry. Co., 158 Fed. 877, is precisely in point, and well considered. It can not be brushed aside on the mere assertion

that it is not authoritative on the question of the exclusiveness of the jurisdiction of the Federal Courts. It is direct and convincing authority, that where the question was substantially the same as in the case at bar, a Circuit Court of the United States has no jurisdiction of the defendant carrier, outside of the district of which it is an inhabitant, where the jurisdiction is not based alone on diversity of citizenship. The court furthermore held in that case that while an action in equity by a shipper to restrain an interstate carrier from enforcing an interstate rate as unreasonable, though maintainable at common law, is nevertheless a suit within the Interstate Commerce Act, so that Federal jurisdiction is not alone dependent on diverse citizenship, and hence such suit can be brought only in the district of which the defendant carrier is an inhabitant, as provided in the Judiciary Act of 1887-8.

In the same volume of the Federal Reports containing the opinion of District Judge Shiras in the Van Patten case, will be found an opinion delivered about the same date by Circuit Judge Colt in the Circuit Court of the United States for the District of Massachusetts in the case of Gorham Manufacturing Co. vs. Watson, 74 Fed. 418, holding that the provisions of the Judiciary Act of 1887-8 in relation to the districts in which parties may be sued, applies to patent infringement suits (of which the Federal Courts have exclusive jurisdiction), and that such a suit cannot be maintained in one district against a corporation which is a citizen and inhabitant of another district and State, following and adhering to his prior decision in Donnelly vs. U. S. Cordage Co., 66 Fed. 613.

When the court comes to examine the case decided by Judge Colt and reported in 66 Fed. 613, it will be found that he reviewed all the authorities up to that date (March 16, 1895), including In re Hohorst, 150 U. S. 653, mainly relied on by Judge Shiras in his opinion in the Van Patten

case, and reached the conclusion that the exemption clause in Section 1 of the general Judiciary Act is not limited in its operation to the class of cases of which the State and Federal Courts have *concurrent* jurisdiction, but applies to all suits, including patent cases, and hence a New Jersey corporation could not be sued in the district of Massachusetts for infringement, although it had a place of business there. We invite special attention to this decision of Circuit Judge Colt, as sound in every particular, and sustained by abundance of authority.

Appellants' counsel fail to mention the very clear construction announced by Mr. Justice Gray of the exemption clause under consideration in the case of In re Keasbey & Mattison Co., 160 U. S. 221, wherein it is distinctly declared (p. 228):

> "The last clause is added by way of proviso to the next preceding clause, which, in its present form, *forbids any suit* to be brought in any other district than that of which the defendant is an inhabitant, and the effect is that in *every suit* between citizens of the United States, when the jurisdiction is founded upon *any* of the grounds mentioned in this section other than the citizenship of the parties, it *must* be brought in the district of which the defendant is an inhabitant, but when the jurisdiction is founded *only* on the fact that the parties are citizens of different States, the suit shall be brought in the district of which either party is an inhabitant." (Italics ours.)
>
> 160 U. S., 221, 228-229.

After this decision of the Supreme Court expressly holding that under the Judiciary Act of 1887-8, a corporation incorporated by a State of the Union cannot be compelled to answer to a suit for infringement of a trade-mark under the Act of March 3, 1881, chapter 138, in a district in which it is not incorporated and of which the plaintiff is

not an inhabitant, although it does business and has a general agent in that district, and after the decisions of Judge Colt above cited, Congress passed an Act defining the jurisdiction of the United States Circuit Courts in cases brought for the infringement of letters patent, approved March 3, 1897 (Chap. 395, 29 Stat., 695), extending the plaintiff's right to sue the infringer in the district where he infringes and has a regular and established place of business. But since the passage of that Act the infringer cannot be sued in any district where he may be found, but must be sued in either the district whereof he is an inhabitant, or in the district where he infringes and has an established place of business.

Bowers vs. Atlantic, G. & P. Co., 104 Fed., 887.

The opinions of Judge Colt cited above were followed as late as January 29, 1903, in the Circuit Court of the United States for the District of Massachusetts by District Judge Lowell in the case of United States, to the use of Brady vs. O'Brien, 120 Fed., 446, who stated (448):

> "In Donnelly vs. Cordage Co., 66 Fed., 613, and in Manufacturing Co. vs. Watson, 74 Fed., 418, it was decided by the Circuit Court for this district that, under the Act of 1887, not even a patent suit could be brought, except in a district of which the defendant is an inhabitant."
>
> 120 Fed., 446, 448.

In Sec. 84, Bates on Federal Equity Procedure, the author states:

> "The only general statutes now in force relative to territorial jurisdiction of the Circuit Courts of the United States, prescribing where suits shall be brought, are the Act of March 3, 1887 (as corrected by the Act of August 13, 1888), and Section 8 of the Act of

March 3, 1875. * * * And Sections 740, 741 and 742, U. S. Revised Statutes, are also still in force."
Bates Fed. Proc., Sec. 84.

In Sec. 86 he states:

"The general rule in regard to the place of bringing suit, or the district in which suit shall be brought under the above statute, is that every suit by original process or proceeding must be brought in the State of which the defendant is a citizen, and in the district in which he resides and of which he is an inhabitant."
Bates Fed. Proc., Sec. 86.

Further in Sec. 89 he states:

"The fact that a railroad corporation, created by the laws of one State, has extended its line of railroad into another State, and has there constructed and owns and operates its railroad under a license and in conformity to the laws of the latter State, does not make such railroad corporation a corporation of the latter State, but for all jurisdictional purposes it continues to be a corporation and a citizen of the former State in which it was created, only; and in all suits in the Circuit Courts of the United States against a railroad corporation so created by one State and owning and operating a line of railroad in another State, it must be treated as a citizen of the State by which it was created, and sued in accordance with the requirements of the statute of March 3, 1887 (as amended by Act of August 13, 1888)."
Bates Fed. Proc., Sec. 89.

In United States vs. Northern Pacific R. Co., 134 Fed., 715, the Circuit Court of Appeals, Eighth Circuit, held that where a statute making provision for suits by the United States does not designate the Federal tribunal in which they shall be instituted, they fall within the general grant

of jurisdiction found in the Judiciary Act of August 13, 1888, and are subject to the limitations therein expressed; and for jurisdictional purposes, under said Act, a corporation is an "inhabitant" only of the State under which it was incorporated, and is not suable elsewhere without its consent.

In that case suit was brought by the United States in the Circuit Court of the United States for the District of Minnesota against the Western Union Telegraph Company, a corporation of New York. The said company's plea objecting to the jurisdiction of that court was overruled in the court below, but sustained in the Circuit Court of Appeals.

The only provision of the Act to Regulate Commerce authorizing a suit in equity by a shipper against a carrier is found in Section 16 as amended June 29, 1906, upon the carrier's failure or neglect to obey the order of the Commission, and the jurisdiction of such suit in equity to enforce such an order, other than for the payment of money, is fixed in the Circuit Court of the United States for the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen. The suit in equity brought by appellees, although involving a Federal question, or arising under that Act, not being specifically provided for therein, the territorial restriction contained in the Judiciary Act of 1887-8 applies, and jurisdiction of the defendants named in the bill can only be sustained in the districts, whereof they are inhabitants, respectively.

The latest decisions fully sustain our views as to the proper construction to be given to the clause in Section 1 of the general Judiciary Act limiting jurisdiction of suits not founded solely on diversity of citizenship to the District in which defendant is an inhabitant.

In the case of Memphis Cotton Oil Co. vs. I. C. R. Co.

et al., a suit was filed to enjoin the carriers from putting into effect on October 1, 1908, increased freight rates.

Judge McCall says:

> "It is clear from the last paragraph that no suit shall be brought in either of the United States courts against any person by any original process in any other district than that whereof he is an inhabitant, except where the jurisdiction is founded only on the fact that the action is between citizens of different States."
> 164 Fed., 290, 291.

In the cases of Imperial Colliery Co. vs. C. & O. Ry. Co. and Powhatan Coal & Coke Co. vs. N. & W. Ry. bills were filed in the Circuit Court for the Southern District of West Virginia praying for injunctions against advances on certain coal rates. Motions were made to dissolve the temporary restraining order because it appeared on the face of the bill that the foundation of the jurisdiction was a Federal question and not diversity of citizenship alone.

On May 27, 1909, District Judge Keller granted the motions to dissolve the injunction and ordered that the bills be dismissed.

In an opinion reviewing all the cases he held that unless the Act of Congress under which the suit is brought specifically provides for its venue, the same is covered by the general Judiciary Act of 1887-8.

He says:

> "In illustration of what I wish to convey I will refer to the interstate commerce act. Under that act Section 9 provided for a suit for damages by any person claiming to be damaged by a common carrier subject to the provisions of the act 'in any District or Circuit Court of the United States of competent jurisdiction.' Here the place of bringing suit is not pointed out, and hence is to be governed by the general law in

force determinative of that fact. So, if a suit in equity were brought to restrain the commission of an injury of like character to those for which Section 9 provides a legal remedy, the same rule as to place of suit should, in my judgment, prevail."

171 Fed., 589, 590-591.

VIII.

NO JURISDICTION OF THE SUBJECT MATTER.

Effect of Injunction Order.

We will now discuss the proposition that the Circuit Court had no jurisdiction of the subject matter of appellants' action prior to aciton by the Interstate Commerce Commission.

Before taking up the legal questions involved in this branch of the case it will help to have a clear idea of the exact effect of the injunction order made by the Circuit Court.

In examining the effect of the injunction order we must constantly bear in mind

> "* * * the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available, to every shipper."
>
> Armour Packing Co. vs. United States, 209 U. S., 56, 80.

The injunction order will be found on pages 131-132 of the Printed Transcript, and reads as follows:

> "The above entitled cause came on to be heard on July 29, 1908, on the rule issued against the defendants to show cause why an injunction *pendente lite* should not be granted.
>
> "Defendants and each of them, appeared specially and objected to the jurisdiction of the court over the persons of the defendants; and the court being of the opinion that the court did have jurisdiction over the persons of the defendants in this cause, and so announcing, thereupon the defendants, and each of them, filed a joint and several demurrer and presented the

same as cause in law why the relief prayed should not be granted.

"Thereupon proof was submitted in behalf of complainants in support of the averments of their bill, and the cause was argued by counsel for the respective parties.

"At the conclusion of the hearing on July 30, 1908, the court took the matter under advisement until August 1, 1908, when the opinion of the court was handed down sustaining the contention of the complainants and directing an issuance of the injunction prayed for upon the condition that complainants should within ten days present their complaint to the Interstate Commerce Commission for investigation and determination of the reasonableness of the rates involved.

"And it appearing that the complainants together with other persons in the cities of Atlanta, Columbus, Rome and Athens, Georgia, have this day filed with the Interstate Commerce Commission their complaint praying the Commission to investigate and determine the reasonableness of the rates involved, also to declare what are just and reasonable maximum rates.

"The court being now fully advised in the premises it is thereupon considered, ordered and decreed as follows, to wit:

> "'That the defendants, The Atlantic Coast Line Railroad Company; the Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company, and each of them, be and they are hereby jointly and severally enjoined from enforcing collection of the advance in rates made effective August 1, 1908, from Ohio and Mississippi River Crossings, Nashville, Tenn., and points with relation thereto to all points within the State of Georgia, on Classes B, C, D, and F, fresh meats C. L. grain products, hay, and packing house products; this injunction to continue and remain in force pending an investigation and determina-

tion of the reasonableness of the rates involved, by the Interstate Commerce Commission, or until further order of the court.

" 'Dated and signed this August 3, 1908.'

EMORY SPEER,
U. S. Judge."

Printed Transcript, pp. 131-132.

It will be noted that the order applies only to five defendant railroad companies, viz: Louisville & Nashville, Southern, Atlantic Coast Line, Cincinnati, New Orleans & Texas Pacific, and Nashville, Chattanooga & St. Louis.

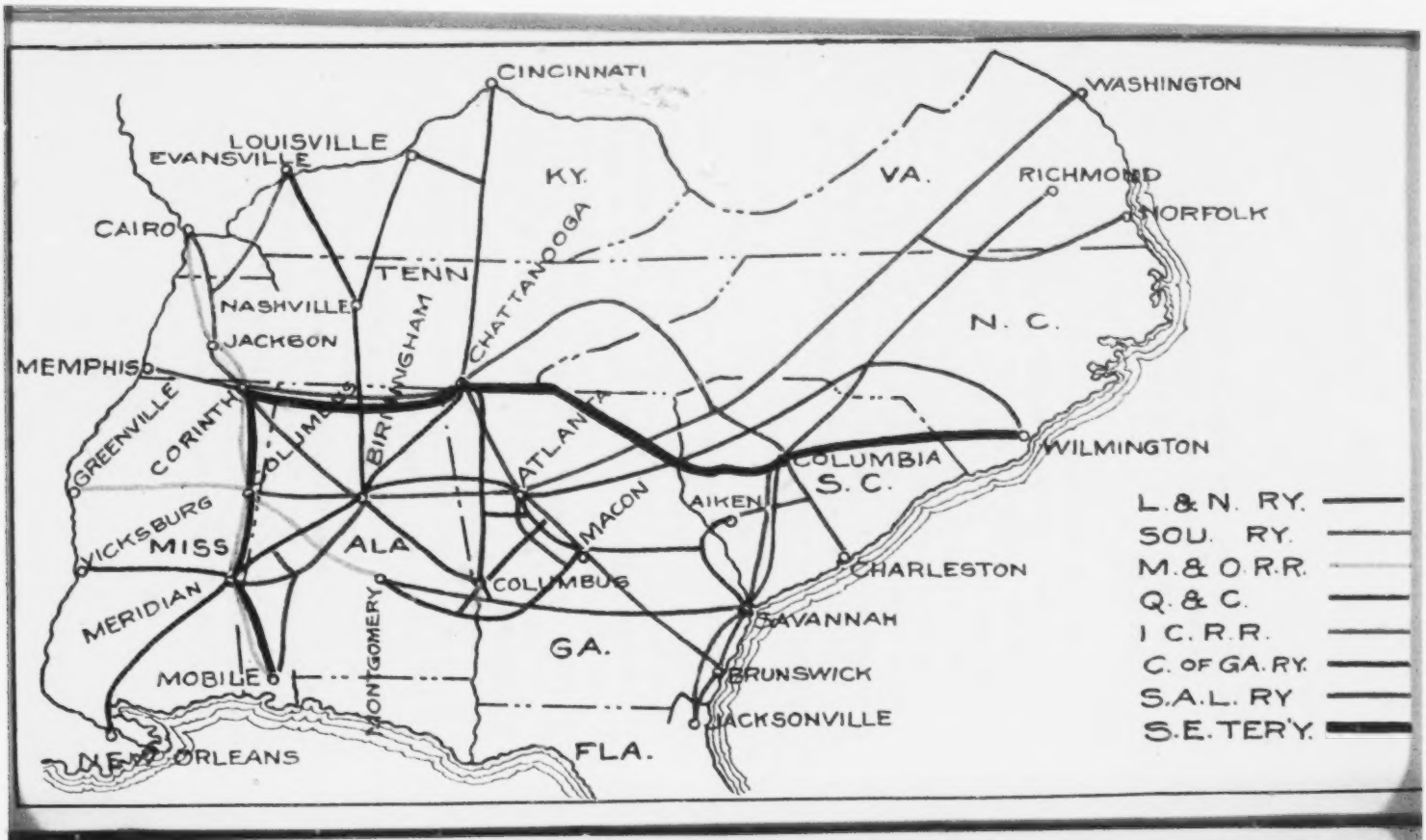
It will be recalled that the bill in Section VII, p. 6, Printed Transcript, states that there are 73 carriers participating and concurring in the tariffs which published the rates complained of, so that the order as we have already noted applies simply to five out of 73 carriers.

To give a better idea of the situation we have printed a diagram on the opposite page.

This diagram shows enclosed by a heavy blue line what is known as "Southeastern Territory," the destination to which the advanced rates applied.

It will be seen that this territory embraces points in five States, to wit, Tennessee, Alabama, Georgia, Florida and South Carolina.

The railways are represented by lines of different colors.


CINCINNATI
WASHINGTON
LOUISVILLE
EVANSVILLE
KY.
VA.
RICHMOND
NORFOLK
CAIRO
TENN
CHATTANOOGA
NASHVILLE
JACKSON
N. C.
MEMPHIS
BIRMINGHAM
ATLANTA
GREENVILLE
CORINTH
COLUMBUS
WILMINGTON
COLUMBIA
S. C.
VICKSBURG
MISS
ALA
MACON
AIKEN
CHARLESTON
MERIDIAN
COLUMBUS
SAVANNAH
MONTGOMERY
GA.
MOBILE
BRUNSWICK
JACKSONVILLE
NEW ORLEANS
FLA.
L. & N. RY.
SOU. RY.
M. & O. R.R.
Q. & C.
I. C. R.R.
C. OF GA. RY.
S. A. L. RY
S. E. TER'Y.

The Transcript shows that the rates complained of applying on certain articles such as flour, grain, hay, etc., coming from Ohio River Crossings and beyond, and Mississippi River Crossings and beyond, were to be advanced into the territory known as "Southeastern Territory" and that territory is outlined on the map by the heavy blue line, and embraces points in five States to wit: Tennessee, Alabama, Georgia, Florida and South Carolina.

It will be noted that the order simply forbids the advance to take effect within the State of Georgia, so that we have this situation:

The advance is left to apply from Louisville and Cincinnati and other Ohio River Crossings to points in the State of Tennessee, for instance Chattanooga. Whereas, under the order the *old* rate would apply to points such as Atlanta, Georgia. The *new* rate would apply to all points in Alabama and the *new* rate would apply to all points of destination in Florida and the *new* rate would apply to points in South Carolina which are in Southeastern Territory.

Taking Atlanta as a representative point of destination we then have this situation:

A shipment destined from Louisville to Chattanooga, Tennessee, would pay the *new* rate, whereas if it were destined to Atlanta it would pay the *old* rate. If it were destined from Louisville to Birmingham it would pay the *new* rate. If it were destined to Jacksonville, Fla., it would pay the *new* rate. If it were destined to Aiken, S. C., it would pay the *new* rate. That is to say, Atlanta would enjoy the *old* lower rate while points in the North, East, South and West of Atlanta would have to pay the advanced *new* rate.

But this is not all.

Even in the State of Georgia those points which do not have the good fortune to be located on the line of one of the defendants to this cause would be obliged to pay the *new* rate.

For instance, all points on the Central of Georgia Railway in Georgia would have to pay the *new* rate, and there are hundreds of such points. All points on the Seaboard Air Line in Georgia would have to pay the *new* rate.

Furthermore, such points as Columbus, Ga., would be in this position; if the shipment were to originate at Evansville, Indiana, coming down by the Louisville and Nashville Railroad to Birmingham, and thence to Columbus, Georgia, by the Southern Railway, both of those lines being enjoined such shipment would proceed to Columbus at the *old* rate.

Whereas if the same shipment originating at the same point (Evansville) were to pass over the Illinois Central to Birmingham and thence by the Central of Georgia to Columbus it would pay the *new* rate, neither of those lines being enjoined.

One merchant in Columbus whose shipment was routed from Evansville via the Illinois Central and the Central of Georgia would thus be obliged to pay the *new* rate, whereas his next door neighbor who routed by the Louisville & Nashville and Southern from the same point of origin would pay the *old* rate.

Furthermore, a point on the Central of Georgia or Seaboard Air Line four or five or six miles out of Columbus would have to pay the *new* rate for the reason that the Central of Georgia and the Seaboard Air Line could not charge any less than the published advanced rate, without being subject to indictment, nor could the shipper or consignee at that point accept any less than the published advanced rate without being subject to indictment and penalties.

The Circuit Court of Appeals during Mr. Wimbish's argument asked a question which Mr. Wimbish promised to answer, but failed to answer.

That is to say, it asked whether a shipment originating on the Illinois Central going to Birmingham and thence over Southern Railway to Atlanta would pay the *old* or *new*

rate, Southern Railway being one of the enjoined lines, and the Illinois Central not being enjoined.

This predicament presented itself to the carriers after the hearing before Judge Speer at Mr. Airy and no one was able to give a satisfactory answer to such a complication, one of the carriers in the through line being enjoined and the other carrier constituting part of the through line not being enjoined, necessarily those carriers who are not enjoined would be obliged to observe the published advanced rate, and that would apply to all roads north of the Ohio River and west of the Mississippi River, for none of those lines, on which a large part of this traffic originates were enjoined.

We were very much interested to hear the answer which Mr. Wimbish might give to this question for we have been unable to answer it ourselves.

And the order left the situation so far as this sort of traffic is concerned in a state of hopeless confusion and danger both to the shippers and to the carriers.

So the effect of the order was to give low rates to certain points in Georgia whereas in the four other States in "South Eastern Territory" affected by the advance contiguous to Georgia, the new rate would apply.

There would be one rate in the jurisdiction of Alabama, and another rate in certain parts of Georgia, one rate in the jurisdiction of Tennessee, and a different rate in the jurisdiction of Georgia, one rate in the jurisdiction of South Carolina and another rate in the jurisdiction of Georgia, one rate in the jurisdiction of Florida and another rate in the jurisdiction of Georgia, and confusion within the State of Georgia itself. There are many places in Georgia which do not happen to be located on any of the enjoined lines which would carry one rate, whereas to those points located on the lines enjoined there would be a different rate.

In other words, in the very same jurisdiction to wit: Georgia, the order operated to make a discrimination in the rates.

This situation created great alarm and confusion not only amongst shippers but amongst the people of other states. For instance, the Railroad Commission of Alabama and the Governor of Alabama became very much excited and thought that the City of Birmingham would be at a great disadvantage in reference to the city of Atlanta, and that trade would be lost to Birmingham and go to Atlanta and other favored points.

So we have the order in this case creating the very evils which the Act to Regulate Commerce is designed to prevent.

The confusion not only extended over the five states of destination, but was felt on the Ohio and Mississippi Rivers and points beyond. Dealers in those commodities at those points were wholly at sea. They did not know whether to make sales in Atlanta at one rate or the other.

They did not know what routes it would be safe for them to ship over and for a short time commerce was not only embarrassed but largely paralyzed by the confusion brought about by this order.

At the conclusion of the argument at Mt. Airy on July 30, and prior to August 1st, the date upon which the rates were to go into effect, carriers realizing that this state of confusion would come about, in order to obviate the difficulties and embarrassments in which shippers and carriers would be placed, telegraphed to the Interstate Commerce Commission and asked that the effective date of the advanced rates be extended. This application was declined by the Commission and the law was allowed to take its course.

It appears in the Printed Transcript, pp. 112-113, that the rates were filed with the Commission some time during

June, and the necessary thirty days notice required by the Act was given, that is to say, the rates were to take effect on August 1st, and were filed with the Commission more than thirty days prior to that time.

No steps were taken by any shipper until the 25th of July, notwithstanding the fact that the tariffs were on file with the Commission in June, so that when the matter did assume the shape which it took, there was no time for any readjustment and as we have already stated, the Commission declined to allow the carriers to postpone the effective date of the rate for sixty days, or for any period, beyond August 1st, so that everybody in "Southeastern Territory" might be able to be treated alike by the carriers.

The Court is familiar with that clause of the statute which forbids railroad carriers to participate in any interstate transportation whatever, unless there is some filed and published rate in effect.

These rates must be filed with the Commission and posted at every station on the line of the carrier so that the public may be advised as to what the rates are, and the law prohibits any carrier from engaging in interstate transportation at all except under published and filed tariff rates.

The court is likewise familiar with that clause of the statute which requires that no rate shall be changed except upon thirty days notice unless the Commission orders otherwise. This is an absolutely binding statutory requirement.

The Court is likewise familiar with the rulings of the Commission that if the rate is in effect and the carrier desires to change that rate its agent must file a notice cancelling the rate which is in effect, and also file a tariff containing the new rate.

The ruling of the Commission on this point is as follows:

"50: When Joint Agent Publishes a New Rate Between Two Points, Without Cancelling the

OLD RATE DULY PUBLISHED BY ONE OF THE CARRIERS, THE OLD RATE ON THAT LINE REMAINS IN EFFECT.

"The published tariffs of an interstate carrier named a rate of 20 cents on a given commodity between specified points. On October 1, 1907, under a proper power of attorney, a joint agent of all carriers serving those two points published a rate of 22 cents. He failed to cancel the 20-cent rate and it was not formally cancelled by the carrier that published it until January 14, 1908. HELD, that because of the failure of the joint agent and of the carrier that published it to cancel that rate in the manner required by section 6 of the act, and rule 8 of Tariff Circular 15-A, the 20-cent rate remained the lawful rate of that carrier until formally cancelled on January 14, 1908."

Conference Rulings, I. C. C., March 10, 1908.

Consequently it will be clear to the Court that when the carriers in this instance sent on new and advanced rates they at the same time specifically cancelled the old rates, for the Commission will not permit and the law does not permit two rates to be in effect at the same time, and as the first of August approached, in this particular case, all the products affected by this advance to all this territory of destination in the five states of Tennessee, Alabama, Georgia, South Carolina and Florida, were in a position where the old rate was cancelled on August fist, and the new rate under the law took its place on that day.

If by any process, except that provided by the Act itself, the new rate could be prevented from going into effect, inasmuch as the old rate was cancelled and out of existence there would be no rate in effect at all and no traffic could move.

Amongst other things section 6 of the Act provides:

"No carrier unless otherwise provided by this Act, shall engage or participate in the transportation of pas-

> sengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act."
>
> Sec. 6, Act to Regulate Commerce.

Under this section a carrier has been indicted and fined $12,000 for transporting six carloads of glass bottles moving in interstate commerce without having its rates on file.

> U. S. vs. Illinois Terminal Railroad Co., 168 Fed., 546.

In that case the Court said:

> "The chief object of the act to regulate commerce is the prevention of discrimination. Carriers, being engaged in a public employment, must serve all members of the public on equal terms. * * * The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discriminations. If this portion of the act is not strictly enforced, the entire basis of effective regulation will be lost. Secret rates will inevitably become discriminating rates. Whenever discriminating rates or practices are made public, a thousand forces of self-interest and of public policy will be set at work to reduce them to fairness and equality."
>
> 168 Fed., 546, 549.

It cannot be too strongly borne in mind that the rates of all carriers under the present legislation of Congress and under the specific modes of publication and establishment provided for by the Act and its amendments, are in reality rates made by an Act of Congress. Such is the view of the Interstate Commerce Commission, as expressed in a recent opinion:

"In other words, although a rate betwen two given points is established in the first instance by the voluntary act of the carrier in filing and posting it in the manner required by law, and in the same manner may be cancelled by the carrier and another rate substituted, nevertheless, when once lawfully published, a rate, so long as it remains uncancelled, is as fixed and unalterable either by the shipper or by the carrier as if that particular rate had been established by a special act of the Congress. When regularly published it is no longer the rate imposed by the carrier, but the rate imposed by the law. The law governing transportation between the two points for which that rate was established requires that rate to be paid by the shipper and collected by the carrier, and any departure from it, either by the carrier or the shipper is as much a crime as it would be if the rate had been fixed by specific enactment. Not even a court may interfere with a published rate or authorize a departure from it when it has been established voluntarily by the carrier. Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, 51 L. Ed., 553, 27 Sup. Ct. Rep., 350."

A. J. Poor Grain Co. vs. C. B. & Q. Ry. *et al.*, 12 I. C. R., 418, 422-423.

Section 6 of the Act prescribes specifically and elaborately the manner of filing, publishing and establishing rates.

It also provides the exact manner in which rates shall be changed.

Amongst other things Section 6 of the Interstate Commerce Act contains the following:

"No *change* shall be made in the rates, fares, and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days notice to the Commission and to the public published as aforesaid, which shall plainly state the *changes* proposed to be made in the schedule then

in force and the time when the *changed* rates, fares, or charges will go into effect; and the proposed *changes* shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection " (Italics ours.)
Sec. 6, Act to Regulate Commerce.

This Court has likewise conclusively decided that the only way in which *changes* in established rates can be made is "in the manner provided by law."

Extracts from the decisions of this Court clearly so establish:

"It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules *until the same were changed as authorized by the Act.*" (Italics ours.)
204 U. S., 426, 437.

"And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule *remained unaltered in the manner provided by law.*" (Italics ours.)
204 U. S., 426, 439.

"When the general scope of the Act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates *until corrected in accordance with the statute* and the prohibitions against preferences and discrimination." (Italics ours.)
204 U. S., 426, 439-440.

"Thus by section 1 of the act approved February 19, 1903, commonly known as the Elkins Act, 32 Stat.

at L., 847, Chap. 708 U. S., Comp. Supp., 1905, p. 599, which, although enacted since the shipments in question, is yet illustrative, the wilful failure upon the part of any carrier to file and publish 'the tariffs or rates and charges' as required by the act to regulate commerce and the acts amendatory thereof, 'or strictly to observe such tariffs *until changed according to law*' was made a misdemeanor." * * * (Italics ours.)

204 U. S., 426, 447.

"It is said that if the carrier saw fit to *change* the published rate by contract the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate to be filed as provided, *subject to change as provided*, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish." (Italics ours.)

Armour Packing Co. vs. U. S., 209 U. S., 56, 81.

Citing New Haven Railroad Co. vs. I. C. C., 200 U. S., 361, 399.

In none of these passages is there any mention made of a method whereby a rate may be changed by a decree or order of a court. On the contrary it is pointed out over and over again that the only way in which a rate can be changed is in accordance with the machinery provided by the Act to Regulate Commerce.

From all this it is apparent that the effect of the injunction order in this case is to create the very discriminations forbidden by the statute, and to enjoin the operation of the Interstate Commerce Act with regard to the filing, publication, establishment and changing of rates.

IX.

NO JURISDICTION OF THE SUBJECT MATTER (Continued).

Effect of Injunction Orders. Views of Commission.

"Courts have in some instances interferred by injunction to prevent such advances, but their jurisdiction to do so is most vigorously combatted by the railways. While this authority, if upheld, may prevent the exaction of unreasonable rates in some cases, its exercise must, in the nature of things, result in more or less confusion, and is quite likely to produce the very discriminations which the law is designed to prevent.

"For example, carriers filed notice of an advance in rates on boots and shoes from New England to Atlanta. Certain shippers made application to the circuit court for an injunction prohibiting such advance, which was granted upon condition that the shippers immediately apply to the Commision for a ruling upon the reasonableness of the proposed advanced rates. Thereupon the carriers, understanding that they could not publish one rate and collect another, withdrew their schedules, leaving in effect the old rate. Since complaint can not be filed with this Commission against a rate which is not in effect, or at least which has not been duly published, it was impossible for the complainants to apply to the Commission. To meet this situation the court permitted a modification of its injunction so that carriers were allowed to publish the advanced schedule, but were restrained from collecting it. At the present time these carriers have established one rate by their tariff and under order of court are collecting another.

"It often happens that these tariffs are joint, being concurred in by connecting lines. The initial line is in one jurisdiction and the delivering line in another. In a suit brought to restrain an advance the court can only act upon the carrier within its jurisdiction. When a tariff has once been filed it can not be changed with-

out the consent of all parties to it. It may happen, therefore, that the initial carrier is enjoined from charging the rate named in the published schedule, while the statute makes it incumbent upon the delivering carrier to collect that rate under severe penalty. If the shipment is prepaid, what through rate shall the initial line receive and what part of that rate can it retain? If the shipment moves collect, what rate shall the delivering line insist upon and what is its division of the total charge?

"As was suggested in our previous report, these injunctions frequently run only in favor of the petitioners in the suit in which they are granted, and only in their favor upon the giving of a bond. It results, therefore, that carriers are collecting one rate of one shipper and a different rate of another shipper for the performance of the same service. It may be said that if the advanced rate is sustained the petitioner will be compelled to make up the balance of his payment under the bond, while if the advance is held unreasonable, the one who has paid it may recover reparation. But as a practical matter the smaller shipper who can not file the bond can not and does not continue in business under the higher rate.

"It would be easy to multiply instances and illustrations showing the confusion and discrimination which now exist. We renew our recommendation of one year ago that this Commission be given authority to restrain the advance of a rate or the change of a rule, regulation or practice pending proceedings before it to determine the reasonableness of the advance or the change, and we earnestly call attention to the necessity for immediate action."

Twenty Second Annual Report (1908) of the Interstate Commerce Commission, pp. 11-12.

X.

NO JURISDICTION OF THE SUBJECT MATTER (Continued).

Analysis of the Commerce Act.

Having seen the effect of the injunction order we will now discuss the legal questions pertaining to the proposition that the Circuit Court had no jurisdiction of the subject matter.

This topic naturally divides, into an analysis of the Commerce Act and an examination of the decisions of the courts.

Our position is that the Congress has passed an Act taking complete control and charge in the most minute detail of the regulation, establishment, correction and alteration of interstate railroad rates, and has assigned to the Interstate Commerce Commission, as a tribunal, exclusive power in the first instance to deal with those rates, and if any fault or flaw exists in the legislation, the Supreme Court of the United States has held in every case so far presented, that it is solely the province of the Congress to deal with the situation by new legislation.

Sections 1, 2, 3 and 4 of the Act to Regulate Commerce prescribe that rates shall be reasonable, non-discriminatory, free from undue preference, and no greater for the short haul than the longer haul when the circumstances are similar.

Section 6 of the Act to Regulate Commerce contains lengthy and elaborate provisions as to the publishing, filing, posting and changing of interstate rates.

The section is too long to print here, but the courts have unanimously held that this section is perhaps the most important means devised by Congress to carry out the great objects of the Act.

Section 8 of the Act to Regulate Commerce provides the civil remedy, for the recovery of damages, by any person injured, of the offending carrier as follows:

> "That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."
>
> Section 8.

Section 9 prescribes the method of procedure in behalf of the person claiming to have been damaged by any unlawful act of the carrier as follows:

> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."
>
> Section 9.

Section 10 provides that where the unlawful act is done or permitted to be done, *wilfully*, or where the carrier is a corporation, any director or officer thereof, or any agent or

person acting for or employed by such corporation, who shall *willingly* suffer or permit to be done any act, matter or thing in said Act prohibited or declared to be unlawful, "shall be deemed guilty of a misdemeanor, and shall upon conviction thereof, in any District Court of the United States within the jurisdiction of which such offense was committed be subject to a fine of not to exceed five thousand dollars for each offense."

Section 13 provides that any person, corporation or association complaining of anything done or omitted to be done by any common carrier subject to the Act in contravention of the provisions thereof, may apply to the Commission by petition, and prescribes the procedure to be followed for obtaining relief.

Section 15 grants to the Commission power and authority, after full hearing, upon a complaint made as provided in Section 13, concerning rates, to declare the same unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of the Act, and to determine and prescribe what rate is just, fair and reasonable to be thereafter charged, and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission finds the same to exist, and to "not thereafter publish, demand or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed."

Section 16 prescribes the two methods of civil procedure for the enforcement of the orders of the Commission, where the carrier fails or neglects to obey the same; the first relating to orders for the payment of money alone, and the second to all orders other than for the payment of money. The first method is as follows:

> "If a carrier does not comply with an order for the payment of money within the time limit in such order,

the complainant or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

Section 16.

The second method is as follows:

"If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the

same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

"From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from."

Section 16.

In addition to these methods of civil procedure, Section 16 imposes a forfeiture of $5,000 to the United States for each offense, where the carrier, or any of its officers or agents, *knowingly* fails or neglects to obey an order made under the provisions of Section 15, pertaining to rates.

Section 16, on the other hand, also provides, in behalf of the carrier, a judicial hearing upon the reasonableness or legality of any order or requirement of the Commission, and fixes the venue of suits brought for that purpose, as follows:

"The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission, shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal

operating office in the District of Columbia, then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts."
Section 16.

In the same section the provisions of "An Act to expedite the hearing and determination of suits in equity, and so forth," approved February 11, 1903, are made applicable to all such suits, including the hearing on an application for a preliminary injunction, as well as to any proceeding in equity, to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce, and all acts amendatory thereof or supplemental thereto.

Furthermore, it is made the duty of the Attorney-General in every such case to file the certificate provided in said expediting Act, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes. Then follow these provisions:

"Provided, that no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: Provided, further, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes."
Section 16.

With all this elaborate machinery provided by the Congress of the United States in its wisdom for the regulation of interstate commerce and the redress of all grievances complained of by shippers against common carriers subject to said Act, growing out of or pertaining to the transportation of such commerce, it is clear that it was intended to be exclusive of all other remedies for alleged wrongful or unlawful acts or omissions on the part of such carriers.

From a careful reading of the foregoing provisions in the Act to regulate commerce, the conclusion is inevitable that the remedies, civil and criminal, therein prescribed, were intended to embrace all causes of action arising out of or pertaining to charges for the transportation of interstate commerce, and that such remedies must be pursued as therein prescribed and in no other manner nor before any other tribunal.

Appellants should have gone first before the Interstate Commerce Commission to obtain an appropriate order against appellees if the advance in freight rates was unjust or unreasonable, and, having obtained such order, should, in case appellees disobeyed the same, have then applied or had the Commission in its own name to apply to the Circuit Court of the United States in the district where appellees have their principal operating offices, respectively, or in which the violation or disobedience shall have happened, for an enforcement of such order by writ of injunction or other process, mandatory or otherwise, as provided in Section 16, supra.

If this civil remedy proved to be insufficient to bring full and expeditious relief, appellants could have asked the Attorney-General to direct the District Attorneys for the proper districts to institute civil suits to recover of appellees, respectively, the forfeiture of $5,000 for each offense, in *knowingly* failing or neglecting to obey such order of the Commission, as provided in the same section, or could have

invoked the aid of a Federal grand jury to indict appellees, or its officers or agents, for the misdemeanor committed in *willingly* suffering or permitting to be done an act prohibited or declared to be unlawful, as provided in Section 10, supra.

It is clear appellants have not pursued any of the statutory remedies, nor will it be contended on their part that they have done so.

Let us now examine the decisions of the courts.

XI.

NO JURISDICTION OF THE SUBJECT MATTER (Continued).

Decisions of the Supreme Court Examined.

In the preceding chapter we have shown by analysis of the Commerce Act itself that the suit at bar will not lie.

We will now take up the decisions of the courts.

The cases conclusively settle that no action attacking rates established or in process of being established can be maintained in any court either State or Federal, law or equity, prior to action by the Interstate Commerce Commission.

Let us first consider the decisions of the Supreme Court of the United States, and then the decisions of the lower courts.

The leading and controlling case is Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426.

In that case this Court addressed itself to the proposition that no court, State or Federal, law or equity, has any original jurisdiction over interstate rates, the same having been reposed by Congress in the Interstate Commerce Commission.

In this opinion this Court at the outset states that the question is measurably one of novel impression and depends for its determination on an examination of the act itself.

This Court then proceeds to set forth briefly the clauses of the Act to Regulate Commerce, pointing out that the Act provides that reasonable rates must be charged and that in order to bring about reasonable rates and also to prohibit undue discrimination the Act ordains that the schedule of rates shall be posted, filed and published; that these rates shall not be departed from under heavy penalties of the law; that the Commission is clothed with power of formulating

the kind of schedules to be printed and filed; that it is clothed with the power of entertaining complaints by a shipper or upon its own motion with regard to rates; that the orders of the Commission must be complied with under heavy penalties; that the orders made by the Commission may be enforced either by action on the part of the shippers or on the part of the Commission in the Federal courts; and that all the amendments of the act have strengthened these provisions and prohibitions.

This Court then goes on to point out that there is not only a relation between the objects of the act, that is to say, the bringing about of reasonable rates and prevention of undue discrimination, but "an indissoluble unity," between those objects and the publication and establishment of rates.

The Court speaks of the rates so published and established as "the standard of rates fixed in the mode provided by the statute."

204 U. S., 426, 440.

Having thus dwelt on the various clauses of the Commerce Act this Court next points out that prior to the adoption of the Act there was great contrariety of opinion as to whether or not the common law prohibited undue discrimination or whether it contented itself simply with the exaction of a reasonable rate.

Two prior decisions of this Court are referred to on this point, one known as the Party rate case, 145 U. S., 263, and one known as the Parsons case, 167 U. S., 447.

The Court says:

> "That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the

principal purposes of the act. Interstate Commerce Commission vs. Cincinnati, N. O. & T. P. R. Co., 167 U. S., 479, 494, 42 L. Ed., 243, 251, 17 Sup. Ct. Rep., 896."

Texas & P. R. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, 439.

In a preceding chapter of this argument we have seen that the Court speaks of the prohibition against undue discrimination as the "central and controlling purpose of the law" (209 U. S., 56, 80).

It is well known that many courts have decided that under the English common law the only complaint a member of the public could make was as to the reasonableness of the charge, and that he could not complain because another person was charged a less amount. For instance, a hack driver might charge 50 cents to one person and 25 cents to another in the same coach for the same distance, yet if 50 cents was a reasonable charge for the service the passenger had no cause of complaint.

Many of the American courts took a different view and brought themselves to believe that the English common law prohibited discrimination.

The Supreme Court of California in the case of Cowden vs. Pacific Coast S. S. Co., made an exhaustive review of all the cases both English and American, and followed the opinion of Mr. Justice Blackburn in Great Western Ry. vs. Sutton, L. R., 4 H. L., 238, to the effect that the English common law did not prohibit undue discrimination but simply gave redress when an unreasonable charge had been collected.

The Supreme Court of California in this case concludes its opinion as follows:

"By reason of the variance which exists in the views of the courts of this country as to what is the common

> law upon this subject, it would seem that the adjudications of the common law courts of England upon such a matter should have pre-eminent and controlling weight with the courts of the various States."
>
> Cowden vs. Pacific Coast S. S. Co., 18 L. R. A., 221, 224.

So the Abilene case shows that we have a statute which creates a new right, the main purpose of which is to create a new right, and that right is that every one shall be treated alike and the statute provides machinery and mode of procedure to enforce the newly created right, which mode of procedure is on hornbook principles exclusive.

This Court proceeds further in its opinion in the Abilene case, and deduces from passages of the Act and the observations already made with regard to undue discrimination, that it is clear what Congress intended to do principally and mainly was to put every one on a parity, and if the remedy remained in the "courts" (and the word "courts" is used throughout the opinion over and over again, not "State courts," not "Federal courts," not "law courts," not "equity courts," but the word "courts" and finally "courts generally"), if courts and juries retained power to adjudge complaints as to unreasonable rates the "standard" or schedule provided by the Act to Regulate Commerce would be departed from and there would be "one rate in one jurisdiction and a different one in another" (204 U. S., 426, 441); just as we see in this case, one rate in Alabama, one rate in Tennessee, one rate in Florida, one rate in South Carolina different from the rate charged under the injunction order of the Circuit Court to Atlanta and under that order different rates in different parts of Georgia itself.

This Court states that if any such construction were placed upon the act it would necessarily destroy the act itself.

The opinion then goes on to say that not only does this follow from a proper reading of the Act and a proper un-

derstanding of the machinery provided to carry out its main and controlling features, but that both the decisions of the Supreme Court of the United States and of the lower Federal courts prior to the Abilene case can but lead to the same conclusion.

The Abilene opinion then proceeds to review the earlier cases.

The first series of cases which are dealt with are three which went to the Supreme Court of the United States from various jurisdictions.

R. R. Co. vs. I. C. C., 162 U. S., 184.
R. R. Co. vs. Behlmer, 175 U. S., 648.
I. C. C. vs. R. R. Co., 190 U. S., 275.

The importance of these cases is emphasized by the consideration that they were brought on the *equity* side of the Circuit Courts and they reached the Supreme Court of the United States and were reversed and sent back to the Commission.

Why?

As this Court points out in the Abilene case and as it pointed out in all three of these cases, a shipper and a railroad company are entitled in the first instance to the opinion of the Interstate Commerce Commission as to the discriminatory character of the rates attacked or as to the reasonableness or legality of the rates, and in each of these cases such opinion of the Commission had not been given in the first instance.

Now these three cases are the first which are mentioned in the opinion of this Court in the Abilene case to prove that no courts have any longer any initial or primary jurisdiction over interstate rates, and we repeat they are exceedingly important in this instance because they arose on the equity side of the courts and not on the law side.

In the cases of Railroads vs. I. C. C., 162 U. S., 184; L. & N. R. R. vs. Behlmer, 175 U. S., 648; I. C. C. vs. S. S. Co., 190 U. S., 275, all of which arose on the equity side, this Court declined to go into the whole evidence in order to determine the questions presented, and in remanding the cases did not authorize the Circuit Court to do so, but sent the cases back to the Commission, saying in the Behlmer case:

> "The defendant was entitled to have its defense considered in the first instance at least, by the Commission, upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact to be passed upon by the Commission in the light of all the facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was."
>
> Louisville & Nashville R. Co. vs. Behlmer, 175 U. S., 675, 676. (Quoting from Texas & P. R. Co. vs. Interstate Commerce Commission, 162 U. S., 197.)

That is to say this Court distinctly decided that a court of equity was without jurisdiction to proceed prior to action by the Interstate Commerce Commission.

The opinion of this Court in the Abilene case then alludes to two cases reported in 158 U. S., 98 and 202 U. S., 242, where shippers attempted to bring suits at law upon contracts for rates different from the published rates, and it was held that it would violate the law if either shippers or railway companies any longer had power to make contracts

for rates which differed from the published or standard rates.

Decisions of the lower Federal Courts are then examined which deal fully with the subject, and this Court concludes that there can be no departure in any way from rates published and filed with the Interstate Commerce Commission prior to action by the Commission.

The opinion then proceeds to examine the amendments of the law and other statutes such as the Elkins Law which lead to the same conclusion, and it is stated that the Elkins law makes it an offense and crime for either shipper or railroad to depart in any way from the published rates *"until changed according to law,"* which is the language of the Elkins act. (Italics ours.)

204 U. S., 426, 447.

The opinion takes up Section 9 and Section 22 of the Commerce Act upon which appellants greatly rely and holds that they

> "cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the Act."
>
> 204 U. S., 426, 446.

All through the opinion of this Court it is repeated again and again that the common law right of action in courts no longer exists.

To the argument that if common law remedies are taken away great hardship and injustice will follow, this Court answers:

> "The proposition that, if the statute be construed as *depriving courts generally*, at the instance of shippers, of the power to grant redress upon the basis that an established rate was unreasonable without previous

> action by the Commission, great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency, and affords no justification for so interpreting the statute as to destroy it." (Italics ours.)
>
> Texas & P. R. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, 447.

As we have already stated several times, the opinion of this Court in the Abilene case advisedly and repeatedly uses the word "courts" and in order to remove every possible doubt as to its meaning uses the words "courts generally" throughout the opinion, indubitably showing that it was the judgment of this Court that the machinery of the Act to Regulate Commerce was complete and exclusive in itself, and that no action by any Court, State or Federal, law or equity, could be taken prior to action by the Commission.

The luminous reasoning of this Court's opinion in that case brings "confirmation strong as Holy Writ" to the wisdom of its judgment, so that its decision in the Abilene case is not only authority, but overwhelmingly convincing to any mind, as well.

For instance how can there be the least lingering doubt that a Chancellor could not have jurisdiction in the premises in the face of the following passage:

> "For if, *without previous action by the Commission*, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, *unless all courts reached an identical conclusion*, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question." (Italics ours.)
>
> Texas & P. R. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, 440.

There are many men of many minds.

The length of the Chancellor's foot is a proverb.

This Court is aware that Chancellors, as well as juries, differ, and the above passage, together with others in the Abilene opinion, show that the Court had in mind courts of equity as well as of law, when it said that there could not be a "uniform standard of rates in the future"; "without previous action by the Commission"; "unless all courts reached an identical conclusion."

"All courts" does not mean *some* courts. It cannot mean law courts to the exclusion of equity courts.

Even if it had not already been authoritatively decided in this opinion it would now have to be decided that there can be no uniformity without previous action of the Commission, unless all Chancellors reach an identical conclusion.

That all Chancellors would do so, is contrary to common knowledge and common sense.

The difficulties of dealing with such a subject as rates by injunctions issuing from courts of equity are accentuated by the fact that a court of equity in the usual course may grant a final decree perpetuating its temporary injunction, which can not be changed except during the term at which it was passed or by appeal.

It is a matter of common knowledge that rates change from day to day. Indeed, in one of the cases Mr. Justice Brewer has stated that a rate may be reasonable one day and unreasonable the next. In other words, rates are necessarily fluctuating in their character.

A court of equity instead of doing justice might inflict great injustice by entering a decree perpetually enjoining a rate. Under the machinery of the Interstate Commerce Act this difficulty is obviated, and the orders of the Commission fixing a new rate are limited in their duration to a period of two years.

This difficulty presents an additional unanswerable argu-

ment against the original or preliminary jurisdiction of a court of equity.

So we see the Abilene case is conclusive of the case at bar.

But it is argued and a few of the lower Federal Courts have held that the case of Southern Railway Co. *et al.* vs. Tift *et al*, 206 U. S., 428, decides that a bill in equity will lie to enjoin an unreasonable rate and that the Abilene case only applies to actions at law.

It is also pointed out that the Tift case was decided subsequently to the Abilene case.

In view of these positions it is necessary to examine carefully the decision of this Court in the Tift case.

The Abilene case was decided on February 25, 1907, and the Tift case on May 27, 1907. They were both decided at the same term, to wit, "October Term, 1906," and in contemplation of law on the same day.

There is nothing therefore in the contention that the Tift case is a later and better considered case than the Abilene decision. It is preposterous to suppose this Court would change its mind on the same day.

An examination of the Printed Transcript of Record in the Tift case on file in this Court, shows that the bill was brought by certain complainants, amongst whom were H. H. Tift, W. S. West, J. Lee Ensign, J. S. Bell & Co., all of whom were alleged to be citizens of the State of Georgia, against certain defendants amongst whom were the Central of Georgia Railway Company alleged to be a corporation and citizen of the State of Georgia; Georgia Southern and Florida Railway Company alleged to be a corporation and citizen of the State of Georgia, and Macon and Birmingham Railway Company, alleged to be a corporation and citizen of the State of Georgia.

> See Transcript of Record, case of Southern Railway Co. *et al.* vs. H. H. Tift *et al.*, pp. 17-18, No. 601, October Term, 1906.

The requisite diversity of citizenship to sustain the jurisdiction in the Tift case solely on that ground, was therefore lacking on the face of the bill, all of the complainants and all of the defendants not being citizens of different States, but on the contrary some of complainants and some of defendants being citizens of the same State, to wit, Georgia.

This Court has decided:

> "Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed."
>
> Construction Co. vs. Gibney, 160 U. S., 217, 219.

Hence this Court of its own motion would have dismissed the bill in the Tift case had the jurisdiction been founded solely upon diversity of citizenship.

A demurrer to the bill in the Tift case was filed raising the question that the requisite diversity of citizenship was lacking.

> See Printed Transcript of Record, Southern Railway Co. *et al.* vs. H. H. Tift *et al.*, No. 601, October Term, 1906, p. 31.

The question was also argued in this Court and is mentioned in the statement of Mr. Justice McKenna.

Nevertheless jurisdiction in the Tift case was retained.

It was retained solely and entirely because of the fact that the machinery provided by the Act to Regulate Commerce had been substantially complied with.

It could not have been and was not retained on any other ground.

So the Tift case is absolutely no authority whatever for

the proposition that this Court has affirmed the right of a Circuit Court of the United States to entertain jurisdiction on general equitable grounds of a controversy such as is presented in the case at bar.

In announcing the opinion in the Tift case Mr. Justice McKenna is careful to show that the bill was retained solely because the steps required by the Commerce Act had been followed.

He states that "appellees on June 23, 1903, filed a petition before the Interstate Commerce Commission" (206 U. S., 434) and "a great deal of testimony was taken on the issues presented and the Commission found and concluded that the advance in rates was not warranted, etc."

206 U. S., 428, 435.

That the Commission made its order condemning the rates on February 7, 1905, and on March 17, 1905, "appellees presented a petition to the Circuit Court stating the substance of the findings of the Commission, and attaching a copy of its report and opinion."

206 U. S., 428, 435.

He also states that subsequently a "supplemental bill" was filed before the court. Certain stipulations of counsel were entered into.

He takes pains to point out that at no stage of the case had the Circuit Court granted any relief "prejudicial" to complainants upon the original bill nor until after action by the Commission.

He says:

> "The Circuit Court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon

sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. *This action of the Commission, with its findings and conclusions, was presented to the Circuit Court, and it was upon these, in effect, the decree of the court was rendered.*" (Italics ours.)

Southern Ry. Co. vs. Tift, 206 U. S., 428, 437.

He goes on to say:

"It was certainly competent for the appellees to proceed in the Circuit Court under Section 16 of the Interstate Commerce Act (24 Stat. at L. 379, Chap. 104, U. S. Comp. Stat., 1901, p. 3154), and to apply by petition to the Circuit Court, 'sitting in equity,' for the court to hear and determine the matter 'as a court of equity,' and issue an injunction 'or other proper process, mandatory or otherwise,' *to enforce the order of the Commission.* We think that, under the broad powers conferred upon the Circuit Court by Section 16 and the direction there given to the court to proceed with efficiency, but without the formality of equity proceedings, 'but in such manner as to do justice in the premises,' and in view of the stipulation of the parties, recited in the decree of the court, the appellants are precluded from making the objection that the court did not have jurisdiction to entertain the petition and grant the relief prayed for and decreed." (Italics ours.)

Southern Ry. Co. vs. Tift, 206 U. S., 428, 437-438.

Again he says with regard to the stipulation referred to:

"There is nothing in that case, however, which precludes the parties, *after action by the Commission, declaring rates unreasonable*, from stipulating in the proceedings prosecuted under Section 16 that the court adjudge the amount of reparation. *By the action of the Commission the foundation for reparation, as pro-*

> *vided in the interstate commerce act, was established.* * * *" (Italics ours.)
> Southern Ry. Co. vs. Tift, 206 U. S., 428, 439-440.

It is clear, therefore, that this Court regarded the proceedings in the Tift case as substantially complying with the provisions of the Act to Regulate Commerce and takes pains in its opinion to reiterate this again and again. Otherwise it would have been obliged to dismiss the bill for want of jurisdiction. That is what Mr. Justice McKenna means when he says the objections to the jurisdiction

> "might present serious questions in view of our decision in Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, *upon a different record than that before us.*"
> 206 U. S., 428, 437.

We again repeat that the Tift case is no authority whatever for the proposition that a court of equity has jurisdiction to restrain unreasonable rates, prior to action by the Commission.

The Tift case does not in any particular modify the Abilene case but on the contrary affirms it and plainly declares that the bill in the Tift case was only retained because the Interstate Commerce Commission had acted on the rates.

This Court specifically points out that it regarded the action of the Circuit Court as based upon the petition and supplemental bill filed in the Circuit Court *"after action by the Commerce Commission."*

A strong case on this point is that of Missouri Pacific Railway Co. vs. United States, 189 U. S., 274.

That was a bill by the United States Government filed at the request of the Interstate Commerce Commission to enjoin alleged discrimination between localities.

The bill was sustained.

It was held by this Court that prior to the passage of the Elkins Act no such bill could have been sustained.

In announcing the opinion of the Court in this case Mr. Justice White says:

> "Bearing in mind that, prior to the request of the Commission upon which the suit was brought, no hearing was had before the Commission concerning the matters of fact complained of, and therefore no finding of fact whatever was made by the Commission, and it had issued no order to the carrier to desist from any violation of the law found to exist, after opportunity afforded to it to defend, the question for decision is whether, under such circumstances, the law officers of the United States at the request of the Commission were authorized to institute this suit.
>
> "Testing this question by the law which was in force at the time when the suit was begun and when it was decided below, we are of the opinion that the authority to bring the suit did not exist.
>
> "But this is not the case under the law as it now exists, since power to prosecute a suit like the one now under consideration is expressly conferred by an act of Congress adopted since this cause was argued at bar, that is, the act 'to Further Regulate Commerce with Foreign Nations and among the States', approved February 19, 1903."
>
> Missouri P. R Co. vs. United States, 189 U. S., 274, 282-283.

The Elkins Act does not confer authority upon private individuals to bring a bill in a court of equity to enjoin a discriminatory unreasonable rate prior to action by the Interstate Commerce Commission but confines this right solely to the United States at the request of the Interstate Commerce Commission.

It is too clear for argument that if the United States could not file such a bill prior to the passage of the Elkins Act no individual could do so.

Moreover, this Court has decided in a long line of cases that it is not competent for a private individual or a railway company to attack in a suit at law or in equity a schedule of rates unless there is some party to the suit competent to represent the public such as a Railroad Commission or the Attorney-General.

In the case of St. L. & S. F. Ry. vs. Gill, 156 U. S., 649, the complainant Gill alleged that he had been charged on several occasions by the railway company rates in excess of three cents per mile prescribed by the statute of Arkansas.

The railway company filed special pleas and answers and set forth that the rate prescribed by the statute would require it to carry below cost.

To these special pleas and answers complainant demurred.

The demurrers were overruled and judgment entered in favor of Gill for the penalties prescribed in the statute.

The railway company appealed to the highest court in Arkansas and the judgment was affirmed by the Supreme Court of Arkansas and a writ of error was sued out to the Supreme Court of the United States as certain Federal questions were made in the record.

Although the demurrers admitted that the railway company was obliged to do business below cost this Court declined to consider the rates because

> "the company's case depended on allegations admitted by the demurrer of a party who, in no adequate sense, represented the public."
> 156 U. S., 649, 666.

This Court reviewed all the cases beginning with Stone vs. Farmers' Loan & Trust Co., 116 U. S., 307, and further said:

> "We now refer to this case (Stone & Farmers' Loan

& Trust Company) for the purpose of calling attention to the facts that the act provided that proceedings to enforce its provisions were to be instituted by the commission, and that the suit was in form a bill in equity to restrain the commission from applying the terms of the act to the Mobile & Ohio Railroad Company."

St. Louis & San Francisco R. Co. vs. Gill, 156 U. S., 649, 658.

The Court then proceeds to discuss the case of C. M. & St. P. R. Co. vs. Minnesota, 134 U. S., 418, and in regard to that case says:

"But it will be observed that the State was represented by the commission, and that the remedy went to the validity of the legislation as affecting the railroad company's business as a whole. It was not a suit between the company and an individual customer."

St. Louis & San Francisco R. Co. vs. Gill, 156 U. S., 649, 659.

The Court then adopts the following quotation from the opinion of Mr. Justice Miller in the Minnesota case:

"* * * it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method; * * *"

St. Louis & San Francisco R. Co. vs. Gill, 156 U. S., 649, 659.

The method designated by Mr. Justice Miller was a bill in equity, but as this Court specifically points out in the Gill case, it must be a bill in equity where some party like a State Railroad Commission represents the public.

It was made clear by this Court in the Gill case that a pri-

vate citizen could not voluntarily constitute himself a general public guardian, or a self-appointed representative of the public; that the courts would not go into the trial of the intricate questions raised in rate cases at the suit of a private citizen, and the language of Mr. Justice Miller to this effect in the prior case was cited in full with approval.

It is true that the Court in the Gill case speaks of rates made by a Legislature, but the present interstate rates of all railroads in the United States are made by the operation of the Interstate Commerce Law, and are as though made by Act of Congress.

> "In other words, although a rate between two given points is established in the first instance by the voluntary act of the carrier in filing and posting it in the manner required by law, and in the same manner may be cancelled by the carrier and another rate substituted, nevertheless, when once lawfully published, a rate, so long as it remains uncancelled, is as fixed and unalterable either by the shipper or by the carrier as if that particular rate had been *established by a special act of the Congress.* When regularly published it is no longer the rate imposed by the carrier, but the rate imposed by the law." (Italics ours.)
>
> A. J. Poor Grain Co. vs. C. B. & Q. Ry. Co. *et al.*, 12 I. C. R., 418, 422.

Railroad rates under the Commerce Act are therefore in the same position as the legislative rates which were before this Court in the Gill case.

All that this Court said in that case, therefore, is equally applicable to the present railroad rates.

Indeed it would be wholly impracticable in this country with eighty millions of people to deal with rate questions if it should be open to each individual or private corporation to bring suit in the courts attacking schedules of rates.

The utter hopelessness of such a situation in itself would

make the creation of the Interstate Commerce Commission an absolute necessity. This tribunal under the present act is open to any person, firm, association or corporation who desires to make complaint thereto as to an interstate rate.

And to this body all complaints must go in the first instance. After the Commission has passed upon the rate the case is then for the first time in a position for the courts to deal with it.

The Commission adequately represents the public and has power to order the carrier to cease and desist from charging a rate found to be unjust and unreasonable or unduly discriminatory, and under the amended law it has power to prescribe the new maximum rate.

The right to resort to the courts was founded upon the idea of contract for service at a reasonable rate.

An interstate rate is no longer altogether in the realm of contract, but has been removed therefrom by Congressional legislation.

In Armour Packing Co. vs. U. S., 209 U. S., 80-82, this Court said:

> "It is strongly urged that there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published, and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper.
>
> * * * * * * * * *
>
> "It is said that if the carrier saw fit to change the

published rate by contract the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be, while in force, the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

"Nor do we find anything in the provisions of the statute inconsistent with this conclusion, in the fact that the statute makes the rate as published or filed conclusive on the carrier. The carrier files and publishes the rate. It may well be concluded by its own action. But neither shipper nor carrier may vary from the duly filed and published rate without incurring the penalty of the law.

"It may be, as urged by petitioner, that this construction renders impossible the making of contracts for the future delivery of such merchandise as the petitioner deals in, and that the instability of the rate introduces a factor of uncertainty, destructive of contract rights heretofore enjoyed in such property. This feature of the law, it is insisted, puts the shipper in many kinds of trade at the mercy of the carrier, who may arbitrarily change a rate upon the faith of which contracts have been entered into. But the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce, and such considerations of inconvenience or hardship address themselves to the law-making branch of the Government. New Haven Railroad Company vs. Interstate Commerce Commission, 200 U. S., 399. It may be that such contracts should be recognized, giving stability to rates for limited periods; that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done. But, as we have said, such considerations address themselves to Congress, not to the courts. It is the province of the judiciary to enforce laws constitutionally enacted,

not to make them to suit their own views of propriety or justice.

"The statute being within the constitutional power of Congress, and being in force when the contract was made, is read into the contract and becomes a part of it.

"If the shipper sees fit to make a contract covering a definite period for a rate in force at the time he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law."

209 U. S., 56, 80-82.

XII.

NO JURISDICTION OF THE SUBJECT MATTER (Continued).

Decisions of the Lower Courts.

The lower courts, State and Federal, have almost unanimously held that the Act to Regulate Commerce and similar State legislation has abrogated all common law remedies, and that no suits either at law or equity can be entertained without prior action by the Commission.

The law cases upon which we rely are as follows:

Winsor Coal Co. vs. C. & A. R. Co., 52 Fed., 716, November, 1892.

McGrew vs. Mo. Pac. Ry. Co., 21 S. W., 463; Sup. Ct. Mo., February, 1893.

Swift vs. P. & R. R. R. Co., 64 Fed., 59, November, 1894.

Van Patten vs. C., M. & St. P. Ry. Co., 81 Fed., 545, June, 1897.

Am. Union Coal Co. vs. Penn. Ry. Co., 159 Fed., 278, February, 1908.

Howard Supply Co. vs. C. & O. Ry., 162 Fed., 188, April, 1908.

Meeker vs. Lehigh Valley R. R., 162 Fed., 354, June, 1908.

Anniston Electric & Gas. Co. vs. So. Ry. Co., Pamphlet Unpublished Opinions, September, 1909.

The equity cases are as follows:

Sou. Pac. Co. vs. Colo. Fuel & Iron Co., 101 Fed., 779.

Vanderslice-Lynde, Etc., Co. vs. Mo. Pac. Ry. Pamphlet Unpublished Opinions.

Central Stock Yards Co. vs. L. & N. R. Co., 112 Fed., 823.

U. S. vs. Michigan Central R. Co., 122 Fed., 544.

C. W. Robinson Lumber Co. vs. I. C. R. *et al.* Pamphlet Unpublished Opinions.

U. S. vs. A. T. & S. F. Ry. Co., 142 Fed., 176.

Potlatch Lumber Co. vs. Ry. Co., 157 Fed., 588.

Bacon vs. Penn. Co. Ct. Common Pleas Allegheny Co. Pa. Pamphlet Unpublished Opinions.

Great Nor. Ry. Co. vs. Kalispell Lumber Co., 165 Fed., 25 (C. C. A., 9th Circuit).

A. C. L. R. R. *et al.* vs. Macon Grocery Co., 166 Fed., 206.

Columbus Iron, Etc., Co. vs. R. R. Co. Opinion by Judge Keller. Pamphlet Unpublished Opinions, since reported, 171 Fed., 713.

Houston Coal & Coke Co. vs. N. & W. Ry., Judge McDowell. Pamphlet Unpublished Opinions, since reported, 171 Fed., 723.

The reasoning and logic of the cases arising on the law side are equally as applicable to cases arising on the equity side, and equally as unanswerable.

The distinction between cases at law and cases in equity attempted to be made by appellants is unsound and we have segregated the law and equity cases simply for the sake of

convenience in meeting the point raised; but there is nothing in the distinction.

It is not our purpose to go into any very elaborate review of the cases at law but we will discuss some of them briefly.

In the case of Winsor Coal Co. vs. C. & A. Ry. Co., 52 Fed., 716, decided November 7, 1892, it was held with regard to a statute of Missouri which was similar to the Interstate Commerce Act, that

> "the right of action existing at common law in favor of the shipper for extortionate charges was superseded by the remedies provided by the statute" (syllabus). 52 Fed., 716.

The case of Van Patten vs. C., M. & St. P. Ry., 81 Fed., 545, decided June 29, 1897, is most interesting and instructive, and Judge Oliver Shiras in that case makes a very elaborate examination of the Commerce Act and shows that the development of railways had been so remarkable that the carrying business had practically passed into their hands; that business had grown so enormously and the manner of handling same had become such that it was no longer possible for each shipper to make a special contract with the railroad for transportation of his property; that railroad lines extended over thousands of miles and there were thousands of stations, and that agents had no authority to make a contract with each shipper; that it had become the custom to issue general schedules of rates in consequence of this condition. Notwithstanding the issuance of these schedules certain favored shippers received rates that other shippers had no knowledge of; that rebating grew up and improper practices prevailed.

That this called for some general legislation such as the commerce act the main object of which was to prevent undue discrimination, the chief means adopted being the publication of rates and their strict observance; that the law made the published rate the "standard" of reasonableness.

He finally reached the conclusion that no complaint would lie unless it contained an allegation that the rate exacted was not the published rate, or that the Interstate Commerce Commission had acted.

We will not consume time with further discussion of the cases decided on the law side of the courts.

It suffices to say that all are in accord with the decision of Judge Shiras.

It is conceded by appellants that the Abilene case prohibits any action at law.

They contend, however, that there still remains the right to file a bill in equity for redress against unreasonable rates.

We will review the cases coming up on the equity side of the courts.

In Southern Pacific Co. vs. Colorado Fuel & Iron Co., 101 Fed., 779, decided April, 1900, it was held by the Circuit Court of Appeals for the Eighth Circuit, as stated in Clause 4 of the synopsis:

> That "it is not within the legitimate province of a court of equity, in a controversy between interstate carriers and shippers, to interpose and fix a maximum freight rate, either upon an independent consideration of what is a reasonable charge or by relation to some other rate *then or theretofore in force*, and thereupon enjoin the carrier from demanding more than the rate so established, inasmuch as such an order effectually deprives an interstate carrier of the right to fix its rate, in the first instance, and to change the same, which power, as it seems, is conceded to the carrier by the Interstate Commerce Act." (Italics ours.)
>
> 101 Fed., 779-780.

In the body of the opinion in that case, the court (at page 786) said that such an order

> "is tantamount both to making a contract between the shipper and the carrier and to an exercise of the legis-

lative power of prescribing rates, neither of which powers properly belongs to a court of equity." (Citing numerous authorities.)

101 Fed., 779, 786.

In the unpublished case of Vanderslice, Etc., Co. vs. Mo. Pac. Co., decided January, 1902, by the Circuit Court of the United States for the District of Kansas, Judge Hook held that an original bill in equity will not lie against a Railway Company as to unduly discriminatory rates unless the Commission has first investigated and acted.

Pamphlet Unpublished Opinions.

In Central Stock Yards vs. Louisville & Nashville Railroad Company, 112 Fed., 823, decided June, 1902, the Circuit Court of the United States for the Western District of Kentucky held that the remedies provided by the Act to Regulate Commerce are exclusive, and that a bill for a mandatory injunction to compel obedience to the provisions of Section 3 of said Act would not lie.

In that case the court said (Ib. 827-8):

"It is only when a ruling has been made by that commission that the powers of a court of equity can, under the act, be invoked for the enforcement of such ruling if the carrier refuses to comply with it. This course is definitely provided for by Section 16 of the Act. It will thus, it seems to the court, be clearly seen that the fullest, and, in the judgment of Congress, the most appropriate remedies were provided for the protection of the rights created under Section 3 of the act, viz.: First, a suit at law; second, an application to the Interstate Commerce Commission; and third, a suit in equity to enforce any ruling of the commission upon such application; and this latter contingency is the only one that authorizes equitable interference, unless we ignore the legislation of Congress, and appeal to some higher law. Congress alone had power to create the right and to provide the remedies for its vindication.

Its action upon the subject can neither be changed nor enlarged by the courts. It was final."
112 Fed., 823, 827-828.

In the case of United States vs. Michigan Central Ry. Co. *et al.*, decided April, 1903, the Circuit Court for the Northern District of Illinois, said:

"In a recent case coming up from Kansas, the Supreme Court denied the right of the government to maintain a suit somewhat similar to this. But in that case, the Interstate Commerce Commission had never granted a hearing, or made an order, in the matters involved. The Commission is the tribunal instituted by the government to inquire primarily into the fact as to whether discrimination exists. To it the shipper can bring his grievance; before it the railroads have a right to be heard. Until an inquiry is there made, and a finding and order had, the jurisdiction of a court of equity may not be invoked, because for the court to take hold, at that primary point in the case, would be to transfer the jurisdiction of the Interstate Commerce Commission—the jurisdiction to first inquire into the facts—to a court of equity. In practical application, it would abolish the Interstate Commerce Commission and devolve upon a Master in Chancery the preliminary inquiry into the facts."
United States vs. Mich. Cen. Ry. Co., 122 Fed., 544, 546.

In the case of C. W. Robinson Lumber Co. vs. I. C. R. R. *et al.*, decided May 29, 1903, by the Circuit Court of the United States for the Southern District of Mississippi, we have an opinion which is interesting, because after the fullest argument the court, four years prior to the decision of this Court in the Abilene case, held that a Circuit Court of the United States in Equity, had no power to enjoin an interstate rate.

That such action by the court was not warranted by the

Act to Regulate Commerce; that it would be tantamount to fixing rates for the future which is a legislative function.

This case is likewise interesting because it arose at the very same time that the Tift case arose, and was brought by the Central Yellow Pine Association.

The complainants in this Central Yellow Pine case attempted to take the same steps which were had in the Tift case, the difference being that Judge Speer in the Tift case held that the court had jurisdiction to enjoin a rate, whereas Judge Niles held the reverse of this proposition.

After the injunction was refused by Judge Niles and the bill dismissed, the Central Yellow Pine Association filed its petition before the Commission and obtained an order in its favor and upon this action of the Commission, they filed proceedings in the courts and this Court finally affirmed the rulings of the Commission and the lower courts in the case of Illinois Central R. R. *et al.* vs. Interstate Commerce Commission, 206 U. S., 441.

The opinion of Judge Niles in the above case has not been published and will be found in the Pamphlet of Unpublished Opinions herewith filed.

In United States vs. A., T. & S. F. Ry. Co., decided December, 1905, the Circuit Court for the Western District of Missouri, held that prior to the Elkins Law the United States Government could not file a suit for injunction upon general equity grounds to prohibit rebates and discrimination, and that contempt proceedings based upon the violation of an injunction issued in such a suit could not be maintained nor could the subsequent passage of the Elkins Act give validity to such injunction proceedings.

U. S. vs. A., T. & S. F. Ry. Co., 142 Fed, 176.

In the case of Potlatch Lumber Company vs. Spokane Falls & N. Ry. Co., 157 Fed., 588, decided December, 1907, the Circuit Court for the Eastern District of Washington held that under the Interstate Commerce Act

as amended by the Act of June 29, 1906, a Court of Equity is without jurisdiction to enjoin a railroad company from charging the rates fixed by its schedule duly published and filed with the Interstate Commerce Commission and which has gone into effect pending a proceeding before the Commission to determine its lawfulness.

In that case, the court felt itself bound by the decision in the Abilene Cotton Oil Company case and pointed out that in the Tift case the Supreme Court had rested its affirmance of the judgment of the court below on the ground that the Interstate Commerce Commission had already acted and that fact had been set up by supplemental bill, and said:

> "If that case be critically examined, it will be found that it is not in any way inconsistent with the former case (referring to the Abilene Cotton Oil Company case), nor does it enlarge upon the doctrines there so plainly enunciated."
> 157 Fed., 588, 597.

After quoting certain portions of the opinion in the Tift case showing the defendants therein had not demurred to the supplemental bill setting up the order of the Commission, the court further said:

> "But no jurisdictional question has been waived by defendants in this case; on the contrary, jurisdiction has been expressly challenged.
> "In view of these considerations, I find myself unable at the present time to grant the relief to which the complainants appear to be entitled according to the allegations of the bill, for the reason that the tribunal created for that purpose is now hearing the controversy. It has original jurisdiction and it is proceeding by virtue of authority expressly conferred by Congress."
> 157 Fed., 588, 597.

In the case of A. F. Bacon vs. Pennsylvania Co., decided by the Court of Common Pleas, Allegheny Co., Pa., April, 1908, Judge Frazer in stating the conclusions reached by the court said:

> "The first question for consideration is whether or not we have jurisdiction to determine the questions raised. The Constitution of the United States confers upon Congress power to regulate commerce among several States, and for the purpose of carrying into effect that provision a number of laws have been enacted by Congress. These statutes are full and comprehensive, and, *inter alia*, provide for the appointment of a Commission whose duty it is to pass upon all rates fixed by common carriers engaged in interstate commerce, and also hear all complaints made either by passengers, shippers or carriers, and that no injustice may be done, it is provided that every common carrier shall file with the Commission a schedule showing all its rates, fares and charges for transportation, not only between points within the State of its domicile, but also between points within that State and points within other States. These schedules are required to be plainly printed and notices for use of the public must be kept posted in conspicuous places in every depot, station, and office of the carrier where passengers or freight are received. These rates when approved by the Commission become the legal chargeable tariffs, and can not be changed except after thirty days' notice to the Commission and to the public. Carriers are prohibited from engaging or participating in the transportation of interstate freight or passengers unless the rates and fares upon which the same are transported have been filed and published in accordance with the provisions of the statute, and when this has been done, carriers are not permitted to charge or demand, collect or receive, a greater or less or different compensation between points named in such schedules, than the rates specified and in effect at the time. If the rate is unreasonable, the party injured may complain to the Interstate Commerce Commission, and if, after hear-

ing, the Commission shall determine the complaint to be well founded and that complainant is entitled to damages for a violation of the Act upon the part of the carrier, it shall make an order directing the carrier to pay the amount which it shall find due on or before a day named. Should the carrier fail to comply with the order within the time limited, complainant may file in the Circuit Court for the district in which he resides, or in which is located the principal operating office of the carrier, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises, and thereupon proceedings shall be had in the manner provided by the Act. Complaints for the recovery of damages must be filed with the Commission within two years from the time the action accrues and no later, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order. This brief reference to the Acts of Congress clearly indicates an intention upon the part of the Federal Government to take complete jurisdiction over the commerce between the States, and to confer *original* jurisdiction upon the Interstate Commerce Commission to make all necessary rules and regulations for the purpose of carrying out the provisions of the statutes. An examination of the Acts of Congress relating to interstate commerce and the decisions of the courts relating thereto, convinces us that the Interstate Commerce Commission has *original* jurisdiction in all controversies arising out of interstate traffic; that the Commission is possessed with power to prevent a threatened injury and remedy any wrong, and that it is the duty of all interstate passengers or shippers to *first* apply to that Commission to redress a wrong before applying to the courts." (Citing the cases of Gulf, Colorado & Santa Fe R. Co. vs. Hefley, 158 U. S., 98; and Texas Pacific Railway Co. vs. Abilene Cotton Oil Co., 204 U. S., 426. (Italics ours.)

Pamphlet Unpublished Opinions.

The opinion concludes as follows:

"Other cases might be cited to the same effect. It seems clear to us that plaintiff's remedy is *primarily* with the Interstate Commerce Commission, and that we are at this time without jurisdiction. The bill must, therefore, be dismissed." (Italics ours.)

Pamphlet Unpublished Opinions.

In the case of Great Northern Ry. vs. Kalispell Lumber Co., decided October, 1908, 165 Fed., 25, the Circuit Court of Appeals for the Ninth Circuit reversed the court below on the ground that a court of equity had no jurisdiction to enjoin a rate which had become effective and was already established.

We will discuss this decision more at length in connection with the cases relied upon by appellants.

In the case of A. C. L. R. R. *et al.* vs. Macon Grocery Co. *et al.*, 166 Fed., 206, decided January, 1909, which is the case at bar, the majority opinion after a very elaborate and clearly reasoned examination, reversed the lower court, and held that courts of equity had no jurisdiction to enjoin interstate rates prior to action by the Interstate Commerce Commission.

Amongst other things Judge McCormick, at page 217, said:

"The Abilene Case was begun and proceeded to final judgment in the State Court, but no account of this condition was taken in the judgment and opinion of the Supreme Court, and all the reasoning of the opinion against the jurisdiction of the court which rendered the judgment then under review applies, we think, at least with equal force against the jurisdiction of the Circuit Court in such cases, and with g.eater force against the original exercise of equitable jurisdiction by injunction or otherwise, to interrupt the order of rate-making as elaborately and imperatively prescribed by the statute, or to supplement the specific and ample remedies prescribed by the act."

166 Fed., 206, 217.

And again at pages 218-219, he said:

> "We are clear in our conviction that there is nothing in the Tift case to support the jurisdiction of the Circuit Court in entertaining the bill exhibited by the appellees in this case, and because we find nothing in the numerous decisions of the Supreme Court which we have examined to weaken the conviction we have expressed that the reasoning which is convincing and controlling against the entertaining of an action at law for damages occasioned by the enforcement of unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the Interstate Commerce Act, for a stronger reason, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of rates, or a change to unjust or unreasonable rates, it is also forbidden by the Interstate Commerce Act, because it would work an incalculably greater mischief.
>
> "We conclude that the bill in this case presents for necessary consideration the proper construction of the act to regulate commerce, and, therefore, the jurisdiction of the court does not rest solely upon the diversity of the citizenship of the parties. We conclude that the sound construction of the different provisions of the act to regulate commerce as amended and now in force necessarily forbids the exercise of the jurisdiction attempted to be invoked by the bill in this case.
>
> "It follows that the decree appealed from must be reversed, and the cause remanded to the Circuit Court with instruction to dismiss the bill without prejudice."
>
> 166 Fed., 206, 218-219.

We quote from the decision of Judge B. F. Keller, handed down May 27, 1909, in the United States Circuit Court for the Southern District of West Virginia, in dismissing a bill practically identical with the one at bar, and filed in that District by the Columbus Iron & Steel Co. against the Kanawha & Michigan Railway Company.

After an exhaustive review of the jurisdiction of courts over the matter of rates prior to the passage of the Interstate Commerce Act, and after a discussion of the Abilene Case, decided since its passage, he proceeds as follows:

> "It is conceded that this decision finally and conclusively denies the right of an individual to sue in any court to recover for an alleged overcharge on the pure ground that the same was unreasonable *per se*, prior to a determination by the Commission of that fact, and it was conceded in the argument that by a parity of reasoning this court would have no jurisdiction to enjoin, prior to action by the Commission, the further enforcement of an existing rate on the ground that it was unreasonable, and that its enforcement would result in irreparable damage to complainant or give rise to a multiplicity of suits; but it is strenuously insisted that the same reasons do not apply where the relief sought is against the filing and enforcement of a schedule of rates not already filed, but notice of whose filing has been given by the carrier.
>
> "To that proposition I cannot assent. To do so would be to declare that a court may have an independent jurisdiction to prevent a threatened wrong when it would have no power to award reparation for the completed injury, a proposition utterly opposed to all ideas of natural justice and the powers of tribunals. To my mind the same reasoning which so clearly shows that the power sought to be exercised by the court in the Abilene Cotton Oil Co. case was repugnant to the provisions of the Act to regulate commerce, applies with equal force to an attempt by the aid of the court, in an independent suit in equity, to prevent the filing of a schedule which it is made the duty of a carrier to file, if he desires to change his rates. To hold otherwise would be to utterly deny to the Interstate Commerce Commission a power and duty primarily committed to it by Congress, viz: the power and duty to decide upon the reasonableness of rates, because the jurisdiction of the Commission can not be exercised over unfiled rates.

"By the act of June 29, 1906, amending Sec. 6 of the Interstate Commerce Act it was provided *inter alia* that the Commission

> 'may in its discretion and for good cause shown allow changes (in rates) upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.'

"I cannot conceive of a case in which the action of a court could exert a wider or more far reaching effect in the way of invading the province of the Commission or be more repugnant to the general scope and purposes of the act than by issuing its injunction to prevent the filing of a schedule of rates with that body." Pamphlet Unpublished Opinions, since reported, 171 Fed., 713, 719-720.

And again he said:

"The difficulty about such a jurisdiction is that it is utterly impracticable as applied to the present case. The Interstate Commerce Commission has been vested with no jurisdiction to determine whether a 'contemplated' rate is reasonable or the reverse. Section 15 of the Act as amended June 29, 1906, limited the powers of the Commission to an investigation and action upon rates and charges 'demanded, charged or collected' by a common carrier and could have no application to rates which had not yet been filed but notice of whose filing had been given."

Pamphlet Unpublished Opinions, since reported, 171 Fed., 713, 720.

The latest opinion is that of the United States Circuit Court for the Western District of Virginia in the case of Houston Coal & Coke Co. vs. N. & W. Ry. and the case

of Powhatan Coal & Coke Co. vs. N. & W. Ry., decided July 8, 1909, opinion by Judge H. Clay McDowell, and reported, 171 Fed., 723.

Judge McDowell reviews all the cases and concludes that there is no longer any jurisdiction in equity courts prior to action by the Interstate Commerce Commission.

Amongst other things he says:

> "It seems to me that the Interstate Commerce Act shows that Congress intended to give to the Commission the sole jurisdiction to pass upon the reasonableness of a rate in the first instance. If this court assumes jurisdiction to enjoin the filing and posting of a rate, it is clear that no case for the action of the Commission could arise. A bill which prayed solely for a temporary, and finally a permanent, injunction forbidding a carrier to file and post an interstate rate would be a pure injunction bill, in no sense ancillary, and before the permanent injunction could issue, at least, the court must investigate and determine the unreasonableness of the proposed rate. By necessary implication as it seems to me the language used in the Act forbids that the court can have such power. Its exercise effectually and finally dispenses with action by the Commission."
>
> Houston Coal & Coke Co. vs. Norfolk & Western Ry. Co. Opinion of Judge H. Clay McDowell. Pamphlet Unpublished Opinions, since reported, 171 Fed., 723, 724.

With regard to the power of a court of equity to enjoin a rate already established Judge McDowell also says:

> "Let us now consider the power of the court to enjoin a carrier from enforcing a rate that has been filed and posted, but which has never been enforced. The theory on which such relief is asked is that the carrier will proceed to file and post the new rate, and that the court will merely enjoin the enforcement of the new

rate until the Commission can act on the question of the reasonableness of the rate.

"For argument's sake, and without considering the question, it is assumed that the Federal Circuit Courts had equity jurisdiction, prior to the enactment of the Interstate Commerce Act, to enjoin a carrier from enforcing an unreasonable interstate rate. Does not the Act by necessary implication repeal the power? It seems to me that it does. If the new rate is filed and posted for the requisite period such rate is 'established.' If enforcement of such rate is enjoined, what rate can the carrier enforce during the period of injunction? It is argued that the former rate can be used. But the filing and posting of the new rate establishes it, and a charge of a less rate is forbidden by the Act both as originally expressed and as amended. 'When a schedule of rates is once established in the mode prescribed by the statute, a former rate is superseded and is no longer in existence,' R. Co. vs. Kalispell Co., 165 Fed., 25, 28. Obviously a power in the courts to enjoin the enforcement of a rate which has been duly established prior to action by the Commission, is totally at variance with the expressed intent of the law."

Houston C. & C. Co. vs. N. & W. Ry. Pamphlet Unpublished Opinions, since reported, 171 Fed., 723, 725.

XIII.

NO JURISDICTION OF THE SUBJECT MATTER (Continued).

Decisions of Lower Courts Relied on by Appellants.

As opposed to all the foregoing, appellants in the courts below relied on the following cases, which we will briefly examine:

Tift vs. Southern Ry. Co. *et al.*, 123 Fed., 789.
Jewett Bros. vs. C., M. & St. P. Ry., 156 Fed., 160.
Kalispell Lumber Co. vs. Great Northern Ry., 157 Fed., 845.
Kiser vs. Cent. of Ga. Ry., 158 Fed., 193.
Macon Grocery Co. vs. A. C. L. R. R. Co., 163 Fed., 738.
Northern Pacific Ry. Co. vs. Lumber Co., 165 Fed. 1 (C. C. A.).

In Tift vs. Southern Railway Co., 123 Fed., 789, Judge Speer granted an injunction on the original bill and held that a court of equity had jurisdiction to restrain an interstate rate, just as he has done in the case at bar.

We have already sufficiently discussed this case in that part of our argument, Section XI, p. 67, which deals with the decision of this Court in the Tift case, 206 U. S., 428.

In the case at bar Judge Speer follows his prior views in the Tift case.

Macon Grocery Co. vs. A. C. L. R. R., *et al.*, 163 Fed., 738.

This latter decision is based largely on a total misconception of the opinion of this Court in the case of Southern Railway Co. vs. Tift, 206 U. S., 428.

Judge Speer likewise misapprehends the force and effect of the Abilene decision.

In quoting the Abilene case he fails to mention that this Court in that case in reviewing the prior decisions specifically cited first of all three cases which came up on the *equity* side of the courts, to wit:

R. R. Co. vs. I. C. C., 162 U. S., 184.
L. & N. R. R. Co. vs. Behlmer, 175 U. S., 648,
I. C. C. vs. L. & N. R. Co., 190 U. S., 275.

Judge Speer contents himself with calling attention simply to the cases which came up on the *law* side of the courts, which cases are likewise cited by this Court in the Abilene opinion.

The case of Jewett Bros. vs. C., M. & St. P. Ry., 156 Fed., 160, is somewhat peculiar.

It is true Judge Carland in that case said, in the first part of his opinion, that a court of equity had power to restrain an interstate rate which had not yet gone into effect.

He argues that because the Interstate Commerce Commission has no power to entertain a complaint as to a rate not yet in effect, a court of equity may deal with a *proposed* rate without infringing upon the prerogatives of the Commission, because the field of a *proposed* rate not being occupied by the Commission, it is no trespass on the functions of the Commission for a court of equity to take jurisdiction.

After having reasoned the matter out in this way he states:

> "This court, therefore, will not enjoin the defendant from putting into effect the proposed rates complained of, as prayed, as the tribunal whose power is invoked has no jurisdiction to decide the question presented to it and the issuance of an injunction would prevent the Interstate Commerce Commission from ever obtaining jurisdiction to investigate the lawfulness of the rate complained of."
>
> Jewett Bros. vs. C., M. & St. P. Ry., 156 Fed., 160, 168.

So the judgment of the court in the Jewett case in declining the injunction is right, and the reasoning in the latter part of the opinion completely overthrows the reasoning in the prior part of the opinion upon which appellants rely.

Judge Carland likewise overlooked the fact that the Act forbids carriers from participating in any interstate transportation at all where no rates are published and in effect.

So if a court undertake to prevent a tariff already filed with the Commission from going into effect, the result would be that, at the end of thirty days (the statutory period), the old schedule would go out of existence, and the new schedule, being suspended by the court, would not be effective. In other words, there would be no published rate in force and the transportation by a carrier of the interstate traffic thus affected by the court's action would have to cease.

The case of Kalispell Lumber Co. vs. Great Northern Ry., 157 Fed., 845, is also relied upon by appellants. This case was reversed by the unanimous opinion of the Circuit Court of Appeals on the ground that a court of equity has no jurisdiction to enjoin a rate which has actually gone into effect.

Great Northern Ry. vs. Kalispell Lumber Co., 165 Fed., 25.

Appellants likewise cite the case of M. C. Kiser vs. Central of Georgia Ry., 158 Fed., 93.

In that case Judge Newman granted an injunction against the proposed advance of rates on shoes, said injunction to remain in effect a reasonable length of time to allow the complainants to present the case to the Interstate Commerce Commission.

The rate not being in effect the Commission declined to take jurisdiction or investigate the subject at all.

The result was that the carriers were obliged to abandon the advance by withdrawing the new rate and putting back the old rate, printing schedules for this purpose.

Had the carriers permitted the rate attacked to remain in

effect they would in every shipment have been confronted with the following dilemma:

(a) Either to disobey Judge Newman's injunction, thus putting themselves in contempt of court, by charging the published rate according to the requirements of the Act to regulate commerce:

(b) Or violate the Act to regulate commerce by not charging the published rate and thus putting themselves in danger of prosecution under that Act.

The order of Judge Newman has created the very discriminations forbidden by the law and Atlanta receives the benefit of less rates on boots and shoes than any of the surrounding territory in Georgia, which has given rise to complaint on the part of Macon, Rome, and other points in that State.

This case is a good illustration of the inevitable result that will follow resort to courts prior to action by the Commission.

The situation in the Kiser case became so embarrassing that Judge Newman finally modified his injunction order and instead of forbidding the carriers to make the rate effective, allowed the rates to be published, but now the injunction prohibits the carriers from collecting the advanced rates.

The Commission has the advanced rates under advisement.

The modified injunction of Judge Newman places the carriers in the position of disobeying the law on every shipment by not collecting the published rate.

The statute is mandatory, requiring the carriers to collect the published rate.

The new rate is now in effect and yet the carriers are not collecting it for fear of contempt of Judge Newman's modified injunction.

Thus the effect of Judge Newman's order is to nullify one of the main features of the Act to Regulate Commerce.

This case, with its complications, embarrassments and dis-

criminations is the one which is spoken of by the Commission in its report for 1908, an extract from which will be found in this brief in Section IX, page 57.

Appellants likewise rely on the majority opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Northern Pacific Ry. vs. Lumber Co., 165 Fed., 1.

This opinion misconceives the decision of the Supreme Court of the United States in the Tift case, 206 U. S., 428.

The opinion was announced by Judge Gilbert and is based upon an entire misapprehension of this Court's opinion in the Tift case, 206 U. S., 428. He likewise falls into the same error that was committed by Judge Carland in the Jewett case, and wholly overlooks the fact that there would be no rate at all in existence if the newly filed rate is restrained from going into effect, the old rate having been cancelled.

Such injunctions would paralyze commerce altogether, as the law absolutely prohibits any transportation at all except on published rates.

The dissenting opinion of Judge Ross in that case completely overthrows the opinion of the majority.

Furthermore, the Circuit Court of Appeals for the Ninth Circuit, on the same date, announced its unanimous opinion in the case of Great Northern Railway Co. vs. Kalispell Lumber Co., 165 Fed., 25, and reversed the judgment of the court below on the ground that a court of equity had no power to enjoin a rate which had already gone into effect.

We submit that these two decisions are inconsistent. One is wrong and the other is right; they are not both right.

If a circuit court has jurisdiction to enjoin in this class of cases at all, its power to do so exists as well after the date fixed in the carriers tariff for the rate complained of, to go into effect as before that date. If a circuit court has no jurisdiction to enjoin such rates after the date fixed in the carriers' tariff to go into effect, it has no jurisdiction to enjoin the same before that date.

XIV.

NO JURISDICTION OF THE SUBJECT MATTER (Continued).

Order Enjoined Rates Already Established.

If there is anything at all in the position that a rate which has not gone into effect may be enjoined, whereas one which has been established cannot be enjoined, in the case at bar the order is void for want of jurisdiction because it is "Dated and signed this August 3d, 1908" (Printed Transcript 131-132), and it reads:

> "That the defendants, the Atlantic Coast Line Railroad Company; the Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; Southern Railway Company, and Cincinnati, New Orleans & Texas Pacific Railway Company, and each of them, be and they are hereby jointly and severally *enjoined from enforcing collection of the advance in rates made effective August 1, 1908*, from Ohio and Mississippi River crossings, Nashville, Tennessee, and points with relation thereto, to all points within the State of Georgia, on Classes B, C, D, and F, fresh meats C. L., grain products, hay, and packing house products; this injunction to continue and remain in force pending an investigation and determination of the reasonableness of the rates involved, by the Interstate Commerce Commission, or until further order of the court.
>
> "Dated and signed this August 3, 1908.
>
> EMORY SPEER,
> *United States Judge.*
>
> "August 3, 1908." (Italics ours.)
> Printed Transcript, 131-132.

It will be observed that the order expressly states it enjoins "rates made effective August 1, 1908."

XV.

THE BILL IN THIS CASE CANNOT BE SUSTAINED UNDER THE SHERMAN ANTI-TRUST LAW.

Minnesota vs. Northern Securities Co., 194 U. S., 48.
Blindell vs. Hagan, 54 Fed., 40.
Hagan vs. Blindell, 56 Fed., 696.
Pidcock vs. Harrington, 64 Fed., 821.
Greer, Mills & Co. vs. Stollar, 77 Fed., 1.
Gulf, etc., Ry. Co. vs. Miami S. S. Co., 86 Fed., 407.
Southern Indiana Exp. Co. vs. U. S. Exp. Co., 88 Fed., 659; 92 Fed., 1022.
U. S. vs. A. T. & S. F. Ry., 142 Fed., 176.
Amer. Union Coal Co. vs. P. R. R. Co., 159 Fed., 278.
Meeker vs. Lehigh Valley R. Co., 162 Fed., 354.
Federal Statutes Anno., Vol. 7, p. 344.

Mr. Justice Harlan, in delivering the opinion in the case first above cited (Minn. vs. Northern Securities Co.), in denying injunctive relief upon a bill filed by the State of Minnesota, used the following language:

> "We do not think that Congress contemplated any such methods for the enforcement of the Anti-Trust Act. We cannot suppose it was intended that the enforcement of the Act would depend in any degree upon original suits in equity instituted by the States *or by individuals* to prevent violations of its provisions. On the contrary, taking all the sections of that Act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppres-

sion of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States, under the 4th section of the Act, by district attorneys of the United States, acting under the direction of the Attorney-General." (Italics ours.)

194 U. S., 48, 70-71.

In Southern Ind. Express Co. vs. United States Express Co., et al., 88 Fed., 659, it was held that:

"The Anti-Trust law of July 2, 1890, does not authorize a Court of Equity to entertain a bill by a private party to enforce its provisions, his remedy being by an action at law for damages." (Syl., 3.)

88 Fed., 659, 660.

This case was subsequently affirmed and the opinion of the court below adopted by the Circuit Court of Appeals for the Seventh Circuit (92 Fed., 1022).

In Gulf C. & S. F. Ry. Co., et al., vs. Miami S. S. Co., 86 Fed., 407, it was held:

"Under the Act of July 2, 1890, entitled 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies,' the only remedy given to any other party than the Government of the United States is a suit for three-fold damages, costs and attorney's fees, and the only party entitled to maintain a bill of injunction for an alleged breach of the Act is the United States by its District Attorney, on the authority of the Attorney-General." (Syl., 4.)

86 Fed., 407.

In Greer, Mills & Co. vs. Stoller, et al., 77 Fed., 1, it was held:

certain by-laws of the association on the ground that the same were illegal as being in restraint of trade and commerce cannot be based upon the Anti-Trust law of July 2, 1890 (26 Stat., 209), for the right given by Section 4 thereof to bring suits for injunction is limited to suits instituted on behalf of the Government. Therefore, the authority given by Section 5 to bring in non-residents of the district cannot be availed of in private suits, and the court can acquire no jurisdiction over them." (Syl., 1.)
77 Fed., 1.

In Pidcock vs. Harrington et al., 64 Fed., 821, Judge Coxe, at page 822, in denying the right of a private individual to sue in equity for the restraint of acts forbidden by the Sherman Anti-Trust law, makes use of the following language:

"It is clear that the right to maintain such a suit is not expressly conferred by the Act. Indeed, such right is, by implication, denied—first, because a private person is given (Section 7) the right to maintain an action at law; and, second, the district attorneys of the United States, under the direction of the Attorney-General (Section 4), are charged with the duty of commencing suits in equity. If it were the intention of the law makers to vest in every irresponsible individual, who may deem himself aggrieved, the right to invoke the drastic and far-reaching remedies conferred by the Act, is it not reasonable to suppose that they would have said so in unambiguous terms?"
64 Fed., 821, 822.

Nor can the bill be sustained on the theory of blending alleged causes of action under the provisions of both the Interstate Commerce Act and the Anti-Trust Act.

In the case of United States vs. A. T. & S. F. Ry. Co., 142 Fed., 176, it was held by the court that—

"The Interstate Commerce Act and the Act known as the 'Sherman Anti-Trust Law' are separate and independent Acts, not germane in character and purpose; and therefore jurisdiction in the Circuit Court of the United States over a bill in equity to enjoin a railroad company from granting rebates to favored shippers cannot be maintained upon the ground that such act of the railroad company is a monopoly within the meaning of the second section of said Anti-Trust Act." (Syl., 4.)

142 Fed., 176, 177.

XVI.

IF HARDSHIPS EXIST REMEDY SOLELY WITH CONGRESS AND NOT COURTS.

It is strongly argued that unless resort can be had to a court of equity hardship will result. Some of the lower courts were impressed by this view. This Court has said, however, that it is for Congress and not the courts to remedy any hardships that may exist.

This Court says:

> "The proposition that, if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant redress upon the basis that an established rate was unreasonable without previous action by the Commission, great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency, and affords no justification for so interpreting the statute as to destroy it."
>
> 204 U. S., 426, 447.

Again in a subsequent case this Court said, speaking of another feature of the Commerce Act:

> "This feature of the law, it is insisted, puts the shipper in many kinds of trade at the mercy of the carrier, who may arbitrarily change a rate upon the faith of which contracts have been entered into. But the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce, and such considerations of inconvenience or hardship address themselves to the law-making branch of the government."
>
> 209 U. S., 56, 81-82.

XVII.

NO VESTED RIGHT IN REMEDIES. INFERIOR FEDERAL COURTS PURELY STATUTORY. REMEDIES THEREIN MAY BE CHANGED OR ABOLISHED.

It is argued that it would be unconstitutional to deprive the Federal Courts of Equity of the right to enjoin rates.

But this is unsound.

Because the legislative power has large control over remedies. With reference to interstate rates Congress has provided elaborate remedies, as we have already seen.

In doing this the old remedies, if any existed, have been abrogated.

Nothing is better settled than that

> "A party has no vested right in a remedy, and the Legislature may pass laws creating, altering, modifying or even taking away remedies. * * *"
> 6 Am. & Eng. Ency. Law., 2d Ed., p. 947.

This is particularly true of the inferior Federal courts for their jurisdiction is purely statutory and may be altered or taken away by Congress at pleasure.

Mr. Justice Clifford, in the case of Rice vs. Minn. & N. W. R. R. Co., 1st Black, 358, has well said:

> "Jurisdiction in common law cases can never be exercised in the Federal courts unless conferred by an Act of Congress, because such courts are courts of special jurisdiction, and derive all their powers from the Constitution and the laws of Congress passed in pursuance thereof."
> 1st Black, 358.

See also—

> Ex parte Bollman, 4 Cranch., 75, 93, 2 L. Ed., 554.
> Kentucky vs. Powers, 201 U. S., page 1, L. Ed., 50, 633.

XVIII.

THERE IS NO EQUITY IN THE BILL.

There is no multiplicity of suits to be prevented nor are there any facts alleged showing irreparable injury.

If the theory of the bill is to restrain a multiplicity of suits there must exist a right to bring the suits.

If no suits can be brought at all, there is no ground for preventing a multiplicity of legally impossible suits.

Complainants can only bring suit under the common law or under some Federal statute.

We have seen that the common law right to recover damages at law because of unreasonable rates has been abrogated.

There is no conflict of opinion on this point amongst the cases.

It is conceded that no suits at law can be brought on this ground. Hence there is no equity to restrain a multiplicity of suits of this character. For not even one suit of that sort can be brought, much less a multiplicity.

Nor is this a bill to prevent a multiplicity of suits under the Anti-Trust Law.

All the cases without exception have settled the proposition that a suit at law cannot be brought under the Anti-Trust statute for damages growing out of alleged unreasonable rates.

Complaints concerning rates are governed exclusively by the Act to Regulate Commerce and cannot be brought under the Anti-Trust Act.

Not one suit, much less a multiplicity of suits, can be brought on this ground under the Anti-Trust Act.

Hence this bill discloses no equity on the ground of restraining a multiplicity of suits which might be brought under the Anti-Trust Act.

Now as to irreparable injury.

The mere allegation, unaccompanied by the facts and circumstances, that the proposed advanced rates are unreasonable does not satisfy the requirements of pleading and is a mere allegation of legal conclusions which are not admitted upon demurrer.

Gould vs. R. R., 91 U. S., 526.

Pullman Palace Car Co. vs. Mo. Pac. Ry. Co., 115 U. S,. 587.

Mosher vs. St. L., I. M. & S. R. Co., 127 U. S., 390.

Kent vs. Lake Superior S. C. R. & I. Co., 144 U. S., 75.

Am. Union Coal Co. vs. Penn. R. R. Co., 159 Fed., 278.

"An allegation in a complaint against an interstate carrier that plaintiffs had been obliged to pay excessive and unlawful rates without any facts to support the same was a statement of a mere conclusion of law, which was not admitted by demurrer."

Meeker vs. Lehigh Valley R. Co., 162 Fed., 354, 355 (syllabus).

Stripped of the conclusions of law which abound in the bill it will be found that no facts at all are alleged showing any irreparable injury. A great deal was said in the argument as to the frightful injustice and awful consequences which would ensue if shippers might have their business destroyed and ruined by the exaction of exorbitant rates imposed by merciless railroads.

The bill, however, perhaps from inadvertence, does not use the word "destruction" or "ruin."

The bill says a great deal about rates being the result of conspiracy and agreement in restraint of trade.

But here again it is full of conclusions of law and there

are no facts stated to establish a conspiracy or agreement in restraint of trade.

Furthermore, if, as a matter of fact, the rates attacked were the result of a conspiracy and agreement in restraint of trade and the facts were well pleaded, there would be no equity on this ground, because it is well known *unreasonably low* rates have sometimes been made as the result of acknowledged conspiracy and agreement contrary to the Anti-Trust Act.

The Commission has in a number of cases decided that a rate may be reasonable in and of itself although it is the result of a conspiracy or agreement in violation of the Anti-Trust Act.

> "The evidence of the complainants very strongly tended to show that an illegal agreement to advance these rates was entered into by these transcontinental lines and that the advanced rates were put in in consequence of that agreement. We do not, however, find it necessary to pass upon that question, because if it were answered in favor of the complainants we should still be of the opinion that this would afford no ground for either reducing the rate from southern mills or awarding reparation.
>
> "We administer the act to regulate commerce alone. The complainants assert that under the provisions of that act this rate is excessive. In determining that issue we should inquire into the circumstances under which the rate was made. If we find that it was not the product of free competition, but was the result of an agreement, this fact would rob the rate of the presumption of reasonableness which might otherwise attach, and should be considered by the Commission in determining whether the advance was justifiable; but if, after giving due weight to that and all other circumstances we are still of the opinion that the rate in effect is not too high, the mere fact that it was the product of an unlawful combination will not justify us in setting it

aside. Such is the fair import of what we have said in several cases. In matters of advances in rates from St. Louis to Texas Points, 11 I. C. C. R., 238; Cattle Raisers' Association of Texas vs. Mo., Kansas & Texas Ry. Co. et al., 11 I. C. C. R., 296; Tift vs. Southern Ry. et al., 10 I. C. C. R., 548; Central Yellow Pine Association vs. Illinois Central R. R. Co. et al., 10 I. C. C. R., 505."

China & Japan Trading Co. vs. Ga. R. R. et al., 12 I. C. C. R., 236, 241.

Hence we have no equity in the bill on this score.

Proceeding with our examination of the bill we find that it alleges that certain rates are to be advanced August 1, 1908. There is not a word said in the bill as to the amount of the actual rates.

For example, it is not stated what the then existing rate on grain from Louisville to Atlanta was per hundred pounds, and for aught that appears in the bill it might have been one or two dollars per hundred pounds. The only thing which is stated in the bill is that the rate is to be advanced two cents per hundred pounds on grain.

This total absence of facts may be accounted for, because the rates on grain from Louisville to Atlanta have been reduced from 57 cents per hundred pounds to 22 cents per hundred pounds in the course of years by various sorts of competition.

To haul one hundred pounds of grain four or five hundred miles from Louisville to Atlanta for 22 cents per hundred is certainly not criminal extortion. To advance that rate to 24 cents per hundred pounds is hardly oppressive or exorbitant, and complainants could not allege that it was destructive or ruinous to them and they do not make any such allegation.

They recognize the difficulty of doing so and omit all facts from the bill which would lead to any such conclusion.

The railroads have fulfilled the prophecy made by early promoters in South Carolina (1829-1833) that rates would be so low "a poor man could not afford to walk."

In his noted book entitled "Railroad Transportation," published in 1900, Professor A. T. Hadley, now President of Yale University, says:

> "Railroad charges in the United States average but a cent and a quarter per ton per mile. In 1884 they fell to a cent and one-eighth. *This is lower than they are anywhere else in the world*, and lower than would have been deemed possible a few years since." (Italics ours.)
>
> Railroad Transportation, A. T. Hadley, p. 104.

In 1907, the last year for which we have statistics, the average revenue per ton per mile in the United States had fallen to .759 cents (Statistics Rys. U. S. 1907, issued by Interstate Com. Com., p. 110), which is even lower than the figures mentioned by President Hadley.

In his statement before the Senate Committee on Interstate Commerce March 18, 1898, Hon. Martin A. Knapp, Chairman of the Interstate Commerce Commission, said:

> "In the first place, as Senator Elkins says, the question of excessive rates—that is to say, railroad charges which in and of themselves are extortionate—is pretty nearly an obsolete question. I would not affirm that there are not such rates; yet, broadly speaking, there are not many such. Those are not the rates of which the public complain. That is not the burden of the complaint."

In view of all this, which is well known, complainants could not state facts in the bill showing that the rates attacked are extortionate for no such facts exist. Therefore they were obliged to omit them.

The mere fact that a rate is to be advanced does not give rise to the presumption of unreasonableness.

This Court said:

> "It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly, when rates are changed, the carrier making the change must, when properly called upon, be able to give a good reason therefor, but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers."
>
> 209 U. S., 108, 119-120.

Further analyzing the bill we find the following allegation:

> "It is submitted that the legal remedy is inadequate for that the loss and damage resulting to your orators from the exaction of unjust and unreasonable rates, and the consequent restriction of their business is a constantly recurring grievance incapable of pecuniary estimation."
>
> Section IX, p. 8, Printed Transcript.

This is a pure conclusion of law.

Furthermore, this Court has decided that speculative damages will not be awarded where injuries are caused by the exaction of unreasonable rates.

Actual damages are easily estimated and consist simply of the difference between the reasonable rate and the unreasonable rate upon traffic handled in reality.

No damages will be allowed on traffic which might have moved, but has not moved.

Parsons vs. C. & N. W. Ry., 167 U. S., 447.

The Interstate Commerce Commission frequently estimates, ascertains and awards to shippers the difference between a reasonable rate and an unreasonable rate, and their award is enforceable in the courts and has been so enforced.

So instead of the damages which might result from an advanced rate being "incapable of pecuniary estimation," precisely the contrary is true.

Now when we search the bill for allegations of fact showing how much loss these complainants will suffer and in what manner it will be brought about, we find this rather remarkable thing:

Instead of irreparable injury being alleged it is simply stated that the profits of complainants will be, not eliminated, but reduced.

The allegation is:

> "The narrow margin of profit obtained by the dealer will not permit him to absorb the entire advance so that the consuming public will be forced to bear some portion of the additional tax represented by a proportional increase in the price. The commodities upon which the rates are to be advanced are of such necessity, and the supply from other sources is so limited that considerable traffic will continue to move even under the exorbitant and unjust rates represented by the advance, but *the effect of the increase* will inevitably *restrict the volume of the traffic, reduce the business of your* orators and other dealers, and deprive the consuming public, or some part thereof, of the ability to purchase and use these commodities to that extent to which they are entitled to the irreparable loss and injury of your

orators and others similarly situated, and to the prejudice of the public interest." (Italics ours.)
Section IX, page 8, Printed Transcript.

The bill thus shows on its face that the only loss which the shipper will incur is a reduction of his profits and that this reduction does not even reach the total amount of the advance, but he passes some of the advance on to the consumer and he complains because he thinks he cannot pass it all on.

The affidavits filed show that many of the dealers felt that the entire advance could be passed on to the consumer in which event the complainants would suffer no reduction of profit at all, and such was the testimony before the Commission, but, of course, we are now simply dealing with the bill.

Our position is that the mere allegation of loss or reduction of profit does not create any equity to support the bill.

The position of complainants amounts to this, that the railroads are bound to conduct their business so as to insure a profit to shippers or other traders.

This is a very common view and is of such importance that we will deal with it in a separate section of this brief.

XIX.

THERE IS NO EQUITY IN THE BILL (Continued).

The Right to Trade is a Qualified Right, and One Trader Can Not be Forced by Law so to Conduct His Business as to Insure Profit to Another Trader.

In the preceding section of this argument we have seen that the bill is based upon the theory that because complainants cannot pass the entire advance in rates on to the consumer, that their profits will be thus reduced, and for that reason they contend that a court of equity should enjoin the advance.

There seems to be a widespread impression that a railroad company must, as a matter of law, so conduct its business as to insure to every shipper a profit in his particular trade.

This erroneous idea should be corrected. To the end of showing the fallacy of this prevalent notion we call attention to the settled law on the subject.

In the Reagan case the Supreme Court of the United States, through Mr. Justice Brewer, uses the following language:

> "Is it just to deprive one party of all compensation in order that another may make some profit? They who invest their money in railroads take the same chances that men engaged in other business do of making profit from the carrying on of their business. * * * The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain. If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an

act of the Legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?"

154 U. S., 362, 409-410.

In this case the Supreme Court of the United States decided that a railroad company is not obliged to conduct its business at a loss in order to furnish profit to other traders.

In the eye of the law the right to trade is not an absolute right but a qualified right, subject to the right of other citizens to do likewise.

In the eye of the law a railway company is merely a trader.

No trader is bound by law to conduct his business so as to insure profit to another trader.

In the case of Mogul Steamship Company vs. McGregor, 23 Q. B. D., 598, Lord Justice Fry said:

"It was argued that the plaintiffs have a legal right to carry on their trade, and that to deprive them of that right by any means is a wrong. But the right of the plaintiffs to trade is not an absolute, but a qualified right—a right conditioned by the like right in the defendants and all Her Majesty's subjects, and a right therefore to trade subject to competition. Now, I know no limits to the right of competition in the defendants—I mean, no limits in law. I am not speaking of morals or good manners. To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts. Competition exists when two or more persons seek to possess or to enjoy the same thing; it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition."

Mogul Steamship Co. vs. McGregor, 23 Q. B. D., 598, 625-6.

That the right to trade is not an absolute right but a qualified right was also passed upon in the following cases:

Phipps vs. London & Northwestern Ry. Co. L. R. (1892), 2 Q. B. D., 229.

Allen vs. Flood, Law Rep. (1898), App. Cases, 1.

Rickett, Smith & Co. vs. Midland Ry. Co., 9 Ry. and Canal Traffic Cases, 107-112.

Hopkins vs. Great Northern Ry. Co., 2 Q. B. D., 224.

Hilton vs. Eckersley, 6 E. C. B., 47, 74.

Assurance Co. vs. Knott L. R., 10 Ch. App., 142.

Macauley vs. Tierney, 19 R. I., 255; 61 Am. State Rep., 770-774.

Walker vs. Cronin, 107 Mass., 555, 564.

Additional authorities might be cited but these are deemed sufficient.

An examination of the above cases will show not only that the right to trade is a qualified right, but that each trader is permitted to promote his own interests as best he may. As stated by one of the English judges in the case of Allen vs. Flood, pp. 26-27:

> "I am not aware of any authority for the proposition that the law recognizes a man's interest in his trade, profession, or business as analogous to property in land or to a right created by contract.
>
> "To shew that an interference with trade was actionable many cases were cited, and the Decoy cases, reported in 11 East, were referred to as containing the key to the supposed rule. But it is perfectly clear that no such proposition as that interference with the use of property for purposes of trade or profit would be actionable was intended to be laid down.
>
> * * * "The interest in the trade which a man carries on may be described figuratively as his property or as an investment for his industry or skill, from which he is entitled to receive a return. But a man can not

be said to have a right to that which no one is obliged to provide for him, namely, employment in his trade or business. It seems equally clear that he can not be said to have a right to the hope of such employment."

Allen vs. Flood, Law. Rep. (1898), App. Cases 1, 26-27.

In the same case the same judge said, p. 26:

"The argument was that those who carry on trade and the skilled workmen whom they employ have an interest in their occupations, like the property in land or personalty. It was admitted to be a right of a somewhat limited character. It was not disputed that it might be invaded in the course of fair competition, or by the operation of trade combinations, and that, as every man was free to conduct his own affairs as he pleased, he might refuse to employ, as had been done by the Glengall Company in this case. Further, it was conceded that advice not to make a contract might not be an actionable wrong. But the remnant of the supposed property in trade or occupation, which was left after these allowances, was said to be especially favored and protected by the law, and that to interfere with those engaged in trade or their workmen without just cause, that is, from any indirect motive, was an actionable tort. No authority was cited for this supposed rule. It seems strange that a principle affecting so materially every branch of trade, should have hitherto remained dormant in the law, and should never have received authoritative definition."

Allen vs. Flood, Law Rep. (1898), App. Cases, 1, 26.

So much for the proposition that the right to trade is a qualified right, subject to the like right in every other trader to pursue his own interests, as best he may.

That a railroad company is a trader has been expressly decided both in this country and in England. In the case

of Rickett, Smith & Company vs. Midland Ry. Co., 9th Ry. and Canal Traffic Cases, 107, 112, Collins, J., says:

> "The railway companies are trading bodies who, in return for a monopoly, or something like it, have been bound to accept certain statutory maxima beyond which their charges must not range * * * but within these maxima, except so far as they have been further modified by the section we are now considering, they must be regarded merely as traders, entitled like other traders to push their business to the best advantage."
> 9 Ry. and Canal Traffic Cases, 107, 112.

In the case of Interstate Commerce Commission vs. Alabama Midland Railway Company, 168 U. S., 144, 173, the United States Supreme Court cited the following passage from an opinion announced by Mr. Justice Jackson on the circuit:

> "The Act to Regulate Commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in *other trades* and pursuits." (Italics ours.)
> I. C. C. vs. Alabama Midland R. Co., 168 U. S., 144, 173.

The same passage was cited with approval by the United States Supreme Court in the Orange Routing Case.

> So. Pac. Ry. Co. *et al.* vs. I. C. C., 200 U. S., 536.
> Also in I. C. C. vs. Chicago, Etc., Ry. Co., 209 U. S., 108.

The Supreme Court of the United States has likewise held railroads subject to what is known as the Sherman

Anti-Trust Act. Inasmuch as this statute was passed to prevent restraints in trade, it could clearly never be applied to any persons not engaged in trade. Therefore it was necessary to the decision in said cases to hold that railroads are traders.

See U. S. vs. Trans-Missouri Frt. Asso., 166 U. S., 290.

U. S. vs. Joint Traffic Asso., 171 U. S., 505.

There can be no doubt that railways are considered and adjudged by the courts, both in England and in this country, to be mere traders.

It is hardly necessary to cite authority to the point that one trader is not bound to conduct his business so as to insure profit to another trader, although this proposition is likewise sustained by the cases already cited, and we have a direct authority on the point in this country.

In the case of Whitwell vs. Continental Tobacco Co., 125 Fed., 454, decided by the Circuit Court of Appeals for the Eighth Circuit, wherein it was held by the court that a trader was not bound to sell his goods to another trader at a price upon which the other could realize a profit by selling again to others, the court used the following language:

> "There is another reason why the complaint in this action fails to state facts sufficient to constitute a cause of action. The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act or omission of a party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of a contract with, or of a duty to, him. The damages from other acts or omissions form a part of that *damnum absque injuria* for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods to the plain-

tiff at prices which would make their purchase profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, *for the defendants owed him no duty to sell their products to him at any price—much less at prices so low that he could realize a profit by selling them again to others.* The complaint therefore fails to show that any legal injury or actionable damage were inflicted upon the plaintiff by the acts of the defendants and the judgment below is affirmed." (Italics ours.)

Whitwell vs. Continental Tobacco Co., 125 Fed., 454, 463.

Similarly it is said in Pollock on Torts, 6th Ed., p. 146:

"To say that a man shall not seek profit in business at the expense of others is to say that he shall not do business at all, or that the whole constitution of society shall be altered. Short of a fundamental reconstruction of the commonwealth, the law must assume that 'free competition is worth more to society than it costs.' (O. W. Holmes, Jr., in Vegelahn vs. Guntner, 167 Mass., 92, 106.)

"A classical illustration of the rule is given by a case in the Year Book of Henry IV., which has often been cited in modern books, and which is still perfectly good authority. Hil. 11 Hen. IV 47, pl. 21. The action was trespass by two masters of the Grammar School of Gloucester against one who had set up a school in the same town, whereby the plaintiffs, having been wont to take forty pence a quarter for a child's schooling, now got only twelve pence. It was held that such an action could not be maintained. '*Damnum,*' said Hankford, J., 'may be *absque injuria,*' as if I have a mill and my neighbor build another mill, whereby the profit of my mill is diminished, I shall have no action against him, though it is damage to me, but if a miller disturbs the water from flowing to my mill, or doth any nuisance of the like sort, I shall have such action as the law gives."

Pollock on Torts, 6th Ed., pp. 146, 147, 148.

Of course a railway company is obliged to sell its product—transportation—to the public at reasonable rates, and in this respect differs from ordinary traders, but it is not bound or required by law to sell transportation, the article in which it trades, at prices so low as to insure a profit to other traders in their line of business.

In fact the law, as settled in numerous cases by the U. S. Supreme Court, holds that it would be confiscation for a State to pass a statute requiring a railway company to sell transportation or give the use of its property to the public without just compensation or a fair return upon the fair value of its property.

This is the situation from the standpoint of the law.

As an economic problem, however, railway companies are obliged so to conduct their business that their patrons will prosper, and they can only prosper by conducting their business at a profit.

Nevertheless, the law does not undertake to force a railway to conduct its affairs so that other traders may carry on their particular line of business at a profit.

> "The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest."
> 173 U. S., 684, 698.

The Legislature has the right

> "to so legislate as to fix maximum rates to prevent extortion or undue charges and to promote the safety, health, convenience or proper protection of the public."
> 173 U. S., 684, 699.

> "If the maximum rates are too high in the judgment of the Legislature, it may lower them, provided they

do not make them unreasonably low as that term is understood in the law."
173 U. S., 684, 694.

The Legislature has the right

"to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company can not go, *but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success.*" (Italics ours.)
173 U. S., 684, 691.

It will be noted that the Supreme Court of the United States has taken precisely the same view of the rights of railways as that laid down by the English Courts; that is to say, within the statutory maxima, which themselves must not be unreasonably low, railways have a right to conduct their own affairs in such manner as may seem best suited for their prosperity and success. We repeat again the language of Collins, J.:

"The railway companies are trading bodies, who in return for a monopoly, or something like it, have been bound to accept certain statutory maxima beyond which their charges must not range * * * but within these maxima, except so far as they have been further modified by the section we are now considering, they must be regarded merely as traders, entitled like other traders to push their business to the best advantage."
Rickett, Smith & Co. vs. Midland Ry. Co., 9 Ry. & Canal Traffic Cases, 107, 112.

XX.

THERE IS NO EQUITY IN THE BILL (Continued).

Governmental Function Exhausted in Fixing Maximum Rates to Prevent Extortion. Within Such Maxima Right of Management is Preserved to Owners of the Property.

In the preceding section of this argument we have seen that this Court has decided that the power of the Legislature to fix maximum rates rests upon the right and duty of the Government to

> "prevent extortion or undue charges, and to promote the safety, health, convenience or proper protection of the public."
> 173 U. S., 684, 699.

In that case this Court decided that this right to fix maximum rates for the purpose of preventing extortion did not include the right of any Government to take away the management of the company.

It was there held that the right of a railway company "to conduct and manage its own affairs" was a property right protected by the Constitution of the United States.

In that case this Court also took pains to point out that the term "convenience" did not include an invasion of the right of a railway

> "to carry on and manage its concerns * * * as a matter of internal administration and in regard to the details of the business which it has the right to change at any moment."
> 173 U. S., 684, 697.

These observations were made by this Court with regard to an Act of the Legislature of the State of Michigan pro-

viding for the sale of thousand mile tickets good for married men and members of their families at less than the maximum rates fixed by a general schedule of the Legislature. The Act making special rates for married men was declared unconstitutional.

> "We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies."
> L. S. & M. S. R. Co. vs. Smith, 173 U. S., 684, 691.

> "The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate."
> L. S. & M. S. R. Co. vs. Smith, 173 U. S., 684, 691.

> "It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law."
> L. S. & M. S. R. Co. vs. Smith, 173 U. S., 684, 691.

In the case of I. C. C. vs. C. G. W. Ry., 209 U. S., 108, this Court again took occasion to say:

> "It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager."
> 209 U. S., 108, 118-19.

So it is clear that insofar as Government is concerned,

either State or Federal and all the departments of Government, the limit of rate regulation consists in the fixing of maximum rates to prevent extortion, not in the fixing of minimum rates, and not in the fixing of any one particular reasonable rate out of many reasonable rates none of which is extortionate.

It is frequently forgotten that the only duty and power of the Government is to prevent extortion which is accomplished by the fixing of maximum rates.

Of course if a railroad company voluntarily fixes a reasonable rate less than the maximum rate, it is the proper function of the Government to require that every shipper should have the benefit of that rate under like circumstances. In other words it is within the powers of Government to prohibit undue discrimination.

It is also frequently forgotten that there can be more than one reasonable rate for the same service.

In the case of Rickett, Smith & Co. vs. Midland Ry. Co., 9 Ry. & Can. Traf., Cases 107, 131, Lord Cobham said:

> "No tribunal, however expert, could undertake to say that a 6s. 6d. rate for the carriage of a ton of coal from Derbyshire to London is reasonable, but that a 6s. 9½d. rate is unreasonable. It may well be that both are reasonable, judged by the rough tests that are alone available."
>
> Rickett, Smith & Co. vs. Midland Ry. Co.
> Derbyshore Silkstone Coal Co. vs. The Same.
> Grassmoor Co. vs. The Same.
> 9 Railway and Canal Traffic Cases, 107, 131.

As said before the Senate Committee on Interstate Commerce, in 1905,

> "It is rarely, if ever, true that there is but one just and reasonable rate for the transportation of a given article between two points. In nearly every instance

there is a wide range within which any rate would be just and reasonable."

Commissioner Prouty has said:

> "The making of a railway rate rests in the judgment of the traffic official. Within very wide limits that official could not demonstrate by any legal standard and legal evidence that his rate was right; neither could the shipper demonstrate by the same methods that it was wrong."
>
> American Monthly Review of Reviews, July, 1906, page 65.

Now if reasonable rates are largely a matter of "judgment" as Commissioner Prouty says, stockholders with temerity enough to risk the requisite millions in a railroad enterprise, should at least have the power of selecting the Traffic Manager upon whose "judgment" they propose to rely for building up a business on their railroad.

It is hardly fair for a Government to select the Traffic Manager and consign to his "judgment" the fate of the capital invested.

If any Government desires to select the Traffic Manager it at least should risk its own capital in the enterprise or provide indemnity against loss.

It would seem from the authorities that such is the case and in justness and fairness it should be so.

The authorities conclusively establish that where railroads are owned and conducted by private capital, the sole concern of the Government and the only Governmental power is to prevent extortion and undue discrimination.

This is brought about by the fixing of maximum rates and the creation of machinery prohibiting undue discrimination.

The management of the company, provided the maxima

are observed and undue discriminations are not practiced, may make such reasonable rates as will develop the traffic.

There may be many reasonable rates for the same service.

No shipper is by law entitled to the very lowest reasonable rate.

XXI.

THERE IS NO EQUITY IN THE BILL (Continued).

English View of Cases Such as One at Bar.

The English have taken a common sense view of cases such as that at bar.

Their analysis of the situation is not at all emotional but quite matter of fact.

They recognize the simple truth that each trader is endeavoring to get as much profit as he can, and that the Government is not interested in such contest further than to see to it, that in the case of a railway, extortion and undue discrimination is not practiced.

Beyond this the traders are left to fight it out amongst themselves.

Collins, J., says:

> "The present case resolves itself merely into a struggle between the collieries and their customers on the one hand, and the railway companies on the other, for a share of the margin of profit which can be made by distributing the rail-borne coal to places difficult of access for that which comes by sea. It is of vital importance to the defendants not to drive the trade away, and I think their enlightened self-interest may be trusted to prevent them doing so; and so far as I can form an opinion upon the statistics they have not done so. Short of this, I see no reason why, subject to the principles I have above stated, they should not get as large a share of the profit as they can."
>
> Rickett, Smith & Co. and others vs. Midland Ry. Co.
> Derbyshire Silkstone Coal Co. vs. The Same.
> Grassmoor Co. vs. The Same.
> 9 Railway & Canal Traffic Cases, 107, 119.

The case at bar is exactly like the one which Collins, J.,

speaks of, and indeed all these cases resolve themselves, in the last analysis, to the very same thing.

All traders desire to make as much profit as they can and each struggles with the other for the lion's share.

There is nothing reprehensible in this on either side. It is simply human nature.

It is not the function of Government however to increase the profits of one trader or the other.

Its function is not to manage the business of either shipper or carrier.

Its duty is fulfilled completely when it stops extortion and undue discrimination on the part of the carriers.

If all this, which is clearly true, were borne in mind, the entire situation might be much simplified.

The whole machinery of Government—the Courts, the Legislatures, the Commissions—would not be strained to the breaking point with an overwhelming flood of cases the sole object of which is to make bargains as to rates between traders that they should make for themselves.

All departments of the Government would be relieved of a killing burden which it is not their province to bear, and which is beyond their powers to bear legally, physically and mentally.

Government should never be called upon to perform the hopelessly intricate task of figuring out from capitalization, mileage, volume of movement, cost, profit, distance, and a myriad other factors what is the lowest reasonable rate that should be charged.

It is beyond the powers of the human mind to perform such a stupendous task.

Such considerations are only pertinent and have only been applied by the courts where the question is whether a legislative maximum rate is confiscatory and therefore unconstitutional.

In such cases the factor of cost, so far as it can be ascertained, is paramount.

These cases simply recognize the economic truth well stated by Mr. A. M. Wellington, M. Am. Soc. C. E.; M. Inst. C. E., a noted civil engineer and writer on railways:

> "The selling price of no marketable commodity, whether transportation or houses or cotton cloth, is fixed by the cost of production, except that if it will not bring a profit on its cost it is no longer produced; and for railways any such attempt would be particularly senseless, for the reason that as we have elsewhere seen (par. 40, 181) the cost of any particular sale of transportation may be considered as varying anywhere from zero upwards; depending, to a far greater extent than in any other commercial transaction, simply upon the amount that can be sold."
>
> P. 196, The Economic Theory of Railway Location, Sixth Ed., 1902. By A. M. Wellington.

Cases where legislative rates are unconstitutional ought to be rare and would be rare, if the simple principle of the law were borne in mind, that

> "The authority to legislate in regard to rates comes from the power to prevent extortion. * * *"
>
> 173 U. S., 684, 698.

The mind can, with comparative ease, form an idea as to whether or not a rate is extortionate, and what the maximum should be to prevent extortion.

This should be the sole question whenever a rate is fixed by Government not what is the lowest reasonable rate. The latter inquiry is hopelessly intricate.

The laws as to usury fix the maximum rate of interest on this principle.

No attempt is made to supervise every note and transac-

tion between banker and borrower with a view to requiring the very lowest reasonable rate of interest, justified by complicated and kaleidoscopic money market conditions.

The simple plan of the law is the practicable plan.

It is hardly too much to say it is the only practicable plan.

It involves but two inquiries, as to any rate in question, namely:

(1) Is the rate extortionate, and if so what maximum should be imposed to prevent the extortion?

(2) Is there any undue discrimination regardless of whether the rate is extortionate or not?

These simple questions the mind is capable of answering.

The mind is incapable of answering the question as to what is the lowest reasonable rate that should be exacted, or the next to the lowest and so on *ad infinitum*.

For the reasons urged and upon the authorities cited we respectfully submit that the decree of the Court below should be affirmed.

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